SUPREME COURT OF THE [redacted]

OCTOBER TERM, [redacted]

No. [redacted]

JOHN W. KEOGH, PLAINTIFF IN ERROR,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED MARCH 24, 1913.

(20,196)

(28,180)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 823.

JOHN W. KEOGH, PLAINTIFF IN ERROR,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 2, 1921.

Pleas in the District Court of the United States for the Placita.
orthern District of Illinois, Eastern Division, begun
ld at the United States Court Room, in the City of Chi-
in said District and Division, before the Honorable
e T. Page, Circuit Judge holding District Court for the
ern District of Illinois, by assignment, on the fourth
June, in the year of our Lord one thousand nine hun-
nd nineteen, being one of the days of the regular June
of said Court, begun Monday, the second day of June,
our Independence the 143rd year.

nt:

Honorable George T. Page, Circuit Judge,

John J. Bradley, U. S. Marshal.

John H. R. Jamar, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

John W. Keogh, *Plaintiff*
vs.
Chicago & Northwestern Railway Company, *et al.* *Defendants.* } No. 32034.

Be It Remembered, that the above entitled action was commenced by the filing of the following Declaration in the above entitled cause, in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, on this the 25th day of November, 1914.

3 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois

Eastern Division.

United States of America
Northern District of Illinois } ss. #32034
Eastern Division.

JOHN W. KEOGH, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois, doing business as John W. Keogh & Company, having his principal office and place of business in the city of Chicago, in said Eastern Division of the Northern District of Illinois, plaintiff, by Alden, Latham & Young, his attorneys, complains of the Chicago & Northwestern Railway Company, a corporation, organized under and by virtue of the laws of the State of Illinois, having its principal office in Chicago, in the Eastern Division of the Northern District of Illinois, a citizen of the State of Illinois; Chicago, Burlington & Quincy Railroad Company, a corporation, organized
4 under and by virtue of the laws of the State of Illinois, having its principal office in Chicago, in the Eastern Di-

vision of the Northern District of Illinois, a citizen of the State of Illinois; Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, organized under and by virtue of the laws of the State of Wisconsin, a citizen of the State of Wisconsin; Chicago, Milwaukee & St. Paul Railway Company, a corporation, organized under and by virtue of the laws of the State of Wisconsin, a citizen of the State of Wisconsin; Illinois Central Railroad Company, a corporation, organized under and by virtue of the laws of the State of Illinois, having its principal office in Chicago, in the Eastern Division of the Northern District of Illinois, a citizen of the State of Illinois; Chicago Great Western Railroad Company, a corporation, organized under and by virtue of the laws of the State of Illinois, having its principal office in Chicago, in the Eastern Division of the Northern District of Illinois; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, organized under and by virtue of the laws of the State of Minnesota, a citizen of the State of Minnesota; The Chicago, Rock Island & Pacific Railway Company, a corporation, organized under and by virtue of the laws of the State of Illinois, having its principal office in Chicago, in the Eastern Division of the Northern District of Illinois, a citizen of the State of Illinois; Hiram R. McCullough, a citizen of the State of Illinois and a resident of Lake Forest, in the Eastern Division of the Northern District of Illinois; Marvin Hughitt, Jr., a citizen of the State of Illinois and a resident of Lake Forest, in the Eastern Division of the Northern District of Illinois; Claude G. Burnham, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois; H. M. Pearce, a citizen of the State of Minnesota; Edward S. Keeley, a citizen of the State of Illinois and a resident of Libertyville, in the Eastern Division of the Northern District of Illinois; Henry E. Pierpont, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois; David W. Longstreet, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois; Oscar Townsend, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois; W. L. Martin, a citizen of the State of Minnesota; James E. Gorman, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern Dis-

Decla... filed 191...

25. trict of Illinois; Harry Gower, a citizen of the State of Illinois and a resident of Chicago, in the Eastern Division of the Northern District of Illinois; E. B. Boyd, a citizen of the State of Illinois and a resident in the Eastern Division of the Northern District of Illinois; defendants, of a plea of trespass on the case.

6 For That, Whereas, heretofore, to-wit, on September 1st, 1912, and for several years prior thereto, the plaintiff was and continuously ever since has been engaged in the business of manufacturing and selling excelsior and tow, the same being useful and valuable articles of merchandise, with his principal office and place of business in Chicago, in said Eastern Division of the Northern District of Illinois, and on, to-wit, September 1st, 1912, and for three years immediately prior thereto, and continuously ever since, owned and operated a factory at St. Paul in the State of Minnesota, where he manufactured excelsior and tow, which said products, the same being useful and valuable articles of merchandise, so manufactured by the plaintiff at St. Paul, Minnesota, as aforesaid, during said period, to-wit, from the year 1909 continuously to the present time, were sold and shipped by the plaintiff from St. Paul, Minnesota, to various persons, firms and corporations in the several states of the United States, in interstate trade and commerce within the meaning of the Act of Congress of July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

And the plaintiff avers that the said defendant corporations during the period of time in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, were common carriers and competing interstate railway companies, engaged in the business of carrying and transporting passengers and freight traffic by railroad from St. Paul, Minnesota, to various points in the several states of the United States, and were during the period afore-

7 said engaged in trade and commerce among the several states of the United States, within the meaning of the Act of Congress approved July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and said individual defendants were during the period aforesaid, the officers, agents and employes of said defendant corporations, or some of them, and engaged in carrying on the said business of said defendant corporations.

And the plaintiff avers that during the period of time mentioned in this count, to-wit, from September 1st, 1912 to the time of the filing of this suit, at St. Paul, Minnesota he manufactured and shipped large quantities of excelsior and tow, to-wit, 10,000 tons, to various persons, firms and corporations in the several states of the United States, and that there was paid to the said defendant corporations, or some of them, for carrying and transporting said excelsior and tow so shipped by him, the plaintiff, as aforesaid, large sums of money, to-wit, the sum of Twenty-five Thousand Dollars ($25,000).

And the plaintiff further avers that because said defendant corporations before and throughout the period in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, were in fact separate and distinct from each other, their said interstate business, trade and commerce should have been conducted strictly on a competitive basis, and would have been so conducted but for the unlawful conspiracy and combination in this count mentioned.

8 And the plaintiff further avers that on, to-wit, September 1st, 1912, and for several years prior thereto, there was maintained, and continuously ever since has been maintained, an association known as "The Western Trunk Line Committee"; that said association has offices in the city of Chicago in the said Eastern Division of the Northern District of Illinois, and employs a large clerical force, the expenses whereof are paid by the members of said association, either in proportion to the mileage of the respective railway companies, or according to some other basis agreed upon; that the members of said association are common carriers and competing interstate railway companies engaged in the business of carrying and transporting passengers and freight traffic by railroad to various points in the several states of the United States in interstate commerce; that the principal object of said association is to agree upon, fix, maintain and publish uniform, arbitrary and non-competitive freight rates for the carriage and transportation of freight traffic by railroad to competing points in the several states of the United States; that said association has a chairman, a secretary and certain other officers; that said association has adopted rules and regulations governing its actions and the conduct of its members, the exact terms of said rules and regulations being unknown to the plaintiff, but the plaintiff avers that the

tion, Nov. 25, said rules and regulations provide among other things, that meetings shall be held from time to time to discuss and agree upon freight rates to be charged for the carriage and transportation of freight traffic to competing points; that each
9 member of said association shall be entitled to one vote on all questions relating to rates on freight traffic to points where the railway line of such member touches; that the unanimous vote of the members voting thereon shall be necessary to fix or change a freight rate; that the members of said association shall abide by the decision of the association and shall maintain, charge and publish the freight rates fixed and agreed upon by the said association; that any member refusing or neglecting to maintain, charge and publish the rates in freight traffic so fixed by the said association shall be expelled and shall suffer other penalties.

And the plaintiff avers that throughout the period in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, the said defendant corporations were members of said Western Trunk Line Committee, and that said defendant corporations through their respective representatives, and certain of said individual defendants as officers, agents or employes of said defendant corporations, as members of said Western Trunk Line Committee, met from time to time in Chicago in said Eastern Division of the Northern District of Illinois, and agreed upon, fixed, maintained and published freight rates on freight traffic to various competing points in the various states of the United States; that said freight rates so agreed upon, as aforesaid, were arbitrary, uniform, unreasonable and non-competitive, and not based on what would be a fair remunerative rate to the carrier transporting such freight traffic that said defendant corporations charged, maintained and published said arbitrary, uniform, unreasonable and non-competitive freight rates in violation of said act of Congress of July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

10 And the plaintiff avers that throughout the period of time in this count mentioned, to-wit, from September 1st 1912 to the date of the filing of this suit, the said defendant corporations and the said individual defendants, acting as the officers, agents and employes of the said defendant corporations, or some of them, carried on their said business in interstate trade and commerce in accordance with, and un-

der the plan of said association known as "The Western Trunk Line Committee" and all competition as to freight rates charged for the carriage and transportation of excelsior and tow from St. Paul, Minnesota to various points in the several states of the United States, which theretofore existed between the defendant corporations, was prevented, eliminated and destroyed by the fixing of arbitrary, uniform and non-competitive freight rates for the transportation of said excelsior and tow so manufactured and shipped by the plaintiff, as aforesaid, in his said business, trade and commerce, the said freight rates so fixed being greatly in excess of the freight rates which, but for the said unlawful conspiracy, would have prevailed for the transportation of said excelsior and tow from St. Paul, Minnesota to said various other points in interstate commerce; whereby, and by means of which said arbitrary and non-competitive freight rates, the plaintiff was deprived of a large sum of money, to-wit, the sum of Five Thousand Dollars ($5,000).

And the plaintiff further avers that the said defendants, on September 1st, 1912, and throughout the period aforesaid, to-wit, from said September 1st, 1912 to the date of the filing of this suit, in manner and form as herein alleged, unlawfully conspired to and did restrain trade and commerce among
11 the several states of the United States, contrary to the provisions of the Act of Congress aforesaid.

And the plaintiff avers that by reason of the unlawful conspiracy in this count mentioned, plaintiff has been injured in his business and property in this, that the freight rates which the defendant corporations exacted and collected for the carriage and transportation of excelsior and tow so manufactured by the plaintiff at St. Paul, Minnesota, aforesaid, and shipped to various points in the United States in interstate trade and commerce, during said period of time, to-wit, from September 1st, 1912 to the date of the filing of this suit, were greatly increased by reason of said conspiracy over the freight rates which would have been charged and collected by said defendant corporations, or some of them, for the carriage and transportation of excelsior and tow so manufactured and shipped by the plaintiff, as aforesaid, if no such conspiracy had been entered into as aforesaid.

And the plaintiff avers that during said period of time, to-wit, from September 1st, 1912 to the date of the filing of this suit, he shipped large quantities of excelsior and tow, to-wit, 10,000 tons, from St. Paul, Minnesota, to various

tion. Nov. 25, points in the United States, in interstate trade and commerce, and that there was paid to said defendant corporations, or to some of them, for the carriage and transportation thereof, a large sum of money, to-wit, Twenty-five Thousand Dollars ($25,000), which said excelsior and tow so shipped as aforesaid, and the freight paid thereon, as aforesaid, is as follows:

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SHIPPED FROM ST. PAUL, MINN., TO THE VARIOUS POINTS NAMED BELOW. List.

Date 1912	Weight			Point of Destination	Rate	Freight Paid	
Sept. 3	33028	lbs.	to	Chicago, Ill.	13½c	$ 44.59	
4	31151	"	"	" "	"	42.05	
6	35624	"	"	Springfield, Ill.	"	48.09	
9	25061	"	"	Rapid City, S. D.	43c	107.76	
18	29343	"	"	Chicago, Ill.	10c	29.35	
18	34259	"	"	St. Louis, Mo.	12½c	42.82	
20	39854	"	"	Springfield, Ill.	13½c	53.80	
20	37365	"	"	Peoria, Ill.	10c	37.37	
21	33859	"	"	Kansas City, Mo.	14c	47.40	
21	30017	"	"	" " "	14c	42.00	
24	36539	"	"	St. Joseph, Mo.	14c	51.16	
26	32953	"	"	Chicago, Ill.	10c	32.96	
27	36964	"	"	Bloomington, Ill.	13½c	49.90	
28	30897	"	"	Des Moines, Ia.	13½c	41.71	
28	30221	"	"	Kansas City, Mo.	14c	42.31	
28	34113	"	"	Des Moines, Ia.	13½c	46.05	$ 759.32
Oct. 2	32268	"	"	La Crosse, Wis.	7½c	24.20	
3	31482	"	"	Naperville, Ill.	10c	31.48	
4	35648	"	"	Minneapolis, Minn.	3c	10.70	
8	36792	"	"	Springfield, Ill.	13½c	49.67	
9	29976	"	"	Sioux City, Ia.	14c	42.00	
11	38543	"	"	Des Moines, Ia.	13½c	52.03	
12	30320	"	"	Kansas City, Mo.	14c	42.45	
15	28834	"	"	" " "	14c	42.00	
17	28270	"	"	St. Louis, Mo.	12½c	37.50	
18	29305	"	"	Sioux City, Ia.	14c	42.00	
19	39751	"	"	Naperville, Ill.	10c	39.75	
19	29614	"	"	Peoria, Ill.	10c	30.00	
19	29580	"	"	Omaha, Nebr.	14c	42.00	
22	32504	"	"	Kansas City, Mo.	14c	45.50	
23	30779	"	"	Naperville, Ill.	10c	30.78	
25	27730	"	"	So. Chicago, Ill.	10c	30.00	
24	30741	"	"	Omaha, Nebr.	14c	43.03	
26	30581	"	"	St. Joseph, Mo.	14c	42.82	
29	35746	"	"	Council Bluffs, Ia.	14c	50.04	727.95
Nov. 1	38542	"	"	Omaha, Nebr.	14c	53.95	
5	30667	"	"	Naperville, Ill.	10c	30.67	
5	31356	"	"	St. Louis, Mo.	12½c	39.19	
6	30812	"	"	Bloomington, Ill.	13½c	41.58	
12	30715	"	"	Pueblo, Colo.	50c	153.57	
12	39869	"	"	Springfield, Ill.	13½c	53.80	
13	30783	"	"	Omaha, Nebr.	14c	43.10	
16	31078	"	"	" "	14c	43.50	
20	29942	"	"	St. Louis, Mo.	12½c	37.50	
22	34360	"	"	Omaha, Nebr.	14c	48.10	
22	38263	"	"	Des Moines, Ia.	13½c	51.65	
23	30874	"	"	Minneapolis, Minn.	3c	9.27	
26	27132	"	"	Albert Lea, Minn.	11c	29.85	
26	30592	"	"	Kansas City, Mo.	14c	44.22	
29	30553	"	"	" " "	14c	42.77	
30	30586	"	"	Naperville, Ill.	10c	30.59	
29	29944	"	"	Lincoln, Nebr.	17c	51.00	804.31
Dec. 5	37408	"	"	Chicago, Ill.	10c	37.40	
5	30734	"	"	Lincoln, Nebr.	17c	52.25	
6	30920	"	"	Omaha, Nebr.	14c	43.28	
7	33768	"	"	" "	14c	47.27	
14	29125	"	"	St. Louis, Mo.	12½c	37.50	
16	30427	"	"	Naperville, Ill.	10c	30.43	
16	30705	"	"	Omaha, Nebr.	14c	42.98	
17	29921	"	"	Bloomington, Ill.	13½c	40.39	
19	31751	"	"	Minneapolis, Minn.	3c	9.53	
21	30432	"	"	Omaha, Nebr.	14c	42.60	
26	30094	"	"	" "	14c	42.14	
30	30822	"	"	Chicago, Ill.	10c	30.82	
31	31301	"	"	So. Chicago, Ill.	10c	31.30	487.89

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1913					Rate		For. $ 2779.47
Jan.	2	29970 lbs.	to	St. Louis, Mo.	12½c	$ 37.50	
	9	28773 "	"	Chicago, Ill.	10c	30.00	
	4	32691 "	"	" "	10c	32.69	
	14	31734 "	"	" "	10c	31.74	
	15	34450 "	"	" "	10c	34.45	
	17	28585 "	"	Springfield, Ill.	13½c	38.72	
	17	30767 "	"	Chicago, Ill.	10c	30.77	
	18	29247 "	"	" "	10c	30.00	
	18	30422 "	"	" "	10c	30.42	
	22	35056 "	"	Des Moines, Ia.	13½c	47.12	
	22	40330 "	"	Chicago, Ill.	10c	40.33	
	23	30385 "	"	Kansas City, Mo.	14c	42.55	
	25	31046 "	"	Omaha, Nebr.	14c	43.46	
	25	32263 "	"	Chicago, Ill.	10c	32.26	
	27	29243 "	"	Leavenworth, Kas.	14c	42.00	
	28	32526 "	"	La Crosse, Wis.	7½c	24.40	
	29	26877 "	"	Mankato, Minn.	9c	24.03	592.44
Feb.	3	28538 "	"	Chicago, Ill.	10c	30.00	
	4	28715 "	"	Sioux City, Ia.	14c	42.00	
	6	41009 "	"	Omaha, Nebr.	14c	57.40	
	10	31169 "	"	Bloomington, Ill.	13½c	42.07	
	11	30008 "	"	Peoria, Ill.	10c	30.00	
	11	30266 "	"	Kansas City, Mo.	14c	42.37	
	12	23481 "	"	Fairmont, Minn.	14c	32.88	
	17	30669 "	"	Kansas City, Mo.	14c	42.93	
	17	41670 "	"	Chicago, Ill.	10c	41.67	
	18	30299 "	"	" "	10c	30.30	
	20	28769 "	"	Kansas City, Mo.	14c	42.00	
	21	32393 "	"	Chicago, Ill.	10c	32.40	
	22	21739 "	"	Davenport, Ia.	13½c	29.35	
	24	39039 "	"	Kansas City, Mo.	14c	54.65	
	24	32883 "	"	Chicago, Ill.	10c	32.88	
	26	32572 "	"	" "	10c	32.57	
	27	30375 "	"	Kansas City, Mo	14c	42.50	657.97
Mar.	10	31827 "	"	Omaha, Nebr.	14c	44.55	
	10	33503 "	"	Springfield, Ill.	13½c	45.22	
	11	33436 "	"	So. Chicago, Ill.	10c	33.44	
	12	29675 "	"	Chicago, Ill.	10c	30.00	
	12	31446 "	"	Flatonia, Texas	58c	182.38	
	13	20913 "	"	Aberdeen, S. D.	23c	48.10	
	14	30843 "	"	Peoria, Ill.	10c	30.85	
	15	32112 "	"	Kansas City, Mo.	14c	44.95	
	18	31393 "	"	Chicago, Ill.	10c	31.40	
	20	31415 "	"	" "	10c	31.41	
	20	30468 "	"	" "	10c	30.47	
	21	31561 "	"	" "	10c	31.56	
	22	31073 "	"	Minneapolis, Minn.	3c	9.30	
	25	34632 "	"	Kansas City, Mo.	14c	48.48	
	25	31308 "	"	Naperville, Ill.	10c	31.30	
	26	31275 "	"	Minneapolis, Minn.	3c	9.39	
	28	35440 "	"	St. Joseph, Mo.	14c	49.62	
	29	30588 "	"	Omaha, Nebr.	14c	42.83	
	29	31964 "	"	" "	14c	44.75	
	29	30370 "	"	Chicago, Ill.	10c	30.37	
	31	31977 "	"	Omaha, Nebr.	14c	44.75	
	31	30820 "	"	Kansas City, Mo.	14c	43.15	938.27
Apr.	2	30973 "	"	Des Moines, Ia.	13½c	41.81	
	3	31788 "	"	Omaha, Nebr.	14c	44.50	
	3	31801 "	"	Bloomington, Ill.	13½c	43.03	
	7	34699 "	"	Chicago, Ill.	10c	34.70	
	5	32928 "	"	Naperville, Ill.	10c	32.92	
	9	31495 "	"	Chicago, Ill.	10c	31.50	
	10	32214 "	"	" "	10c	32.20	
	15	34139 "	"	La Salle, Ill.	13½c	46.08	
	16	31102 "	"	E. St. Louis, Mo.	12½c	38.88	
	19	36667 "	"	Minneapolis, Minn.	3c	11.01	
							$ 4968.15

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1913					Rate	For. $ 4968.15	List.
Apr. 21	33716	lbs.	to	Springfield, Ill.	13½c	$ 46.51	
22	31359	"	"	Omaha, Nebr.	14c	43.90	
24	31001	"	"	Sioux City, Ia.	14c	43.40	
26	32227	"	"	Omaha, Nebr.	14c	45.20	
28	33656	"	"	Des Moines, Ia.	13½c	45.44	
28	30089	"	"	Chicago, Ill.	10c	30.05	611.13
May 1	31978	"	"	Omaha, Neb.	14c	44.75	
1	30849	"	"	Naperville, Ill.	10c	30.85	
2	31459	"	"	Springfield, Ill.	13½c	42.47	
3	29415	"	"	Albert Lea, Minn.	11c	32.35	
8	30165	"	"	Winona, Minn.	7½c	22.63	
13	30101	"	"	Chicago, Ill.	10c	30.10	
14	32843	"	"	Omaha, Nebr.	14c	54.98	
15	32227	"	"	Bloomington, Ill.	13½c	43.50	
15	30762	"	"	Sioux City, Ia.	14c	43.06	
16	32353	"	"	Chicago, Ill.	10c	32.35	
17	32313	"	"	Minneapolis, Minn.	3c	9.69	
17	33266	"	"	Omaha, Neb.	14c	46.56	
19	26376	"	"	Chicago, Ill.	10c	30.00	
20	27293	"	"	Fargo, N. D.	20c	54.58	
20	29621	"	"	Chicago, Ill.	10c	30.00	
21	30196	"	"	La Crosse, Wis.	7½c	22.65	
21	30607	"	"	Concordia, Kas.	37½c	114.77	
22	21803	"	"	Davenport, Ia.	13½c	29.44	
22	31480	"	"	Peoria, Ill.	10c	31.48	
27	32551	"	"	Chicago, Ill.	10c	32.55	
27	32483	"	"	" "	10c	32.49	
29	30332	"	"	Lincoln, Nebr.	17c	51.56	809.06
June 2	30400	"	"	Naperville, Ill.	10c	30.40	
6	29672	"	"	Chicago, Ill.	10c	30.00	
7	29582	"	"	La Crosse, Wis.	7½c	22.50	
11	32707	"	"	Winona, Minn.	7½c	24.53	
12	30362	"	"	Leavenworth, Kas.	14c	42.50	
10	32230	"	"	Chicago, Ill.	10c	32.23	
13	31434	"	"	Springfield, Ill.	13½c	42.43	
16	30969	"	"	Omaha, Nebr.	14c	43.35	
18	33098	"	"	Chicago, Ill.	10c	33.10	
20	32540	"	"	Omaha, Nebr.	14c	45.55	
21	35266	"	"	Minneapolis, Minn.	3c	10.58	
21	31308	"	"	Burlington, Ia.	13½c	42.26	
24	23048	"	"	Duluth, Minn.	10c	23.05	
24	33461	"	"	Burlington, Ia.	13½c	45.17	
25	30461	"	"	Chicago, Ill.	10c	30.46	
26	31440	"	"	Des Moines, Ia.	13½c	42.44	540.55
July 2	32304	"	"	Bloomington, Ill.	13½c	43.61	
8	31834	"	"	Omaha, Nebr.	14c	44.57	
9	32129	"	"	Chicago, Ill.	13½c	42.93	
10	31246	"	"	La Crosse, Wis.	7½c	23.43	
14	31596	"	"	Kansas City, Mo.	14c	44.23	
15	32119	"	"	Omaha, Nebr.	14c	44.97	
16	33107	"	"	Chicago, Ill.	13½c	40.50	
17	31699	"	"	Omaha, Nebr.	14c	44.38	
18	31389	"	"	Chicago, Ill.	13½c	41.85	
19	30443	"	"	Chicago, Ill.	13½c	41.85	
21	30400	"	"	La Crosse, Wis.	7½c	22.80	
21	33474	"	"	Chicago, Ill.	13½c	45.18	
22	31484	"	"	" "	13½c	42.50	
25	30359	"	"	Sioux City, Ia.	14c	42.50	
28	31323	"	"	Chicago, Ill.	13½c	42.12	
28	29739	"	"	" "	13½c	40.15	
29	30795	"	"	St. Joseph, Mo.	14c	43.11	
30	24129	"	"	Minneapolis, Minn.	3c	7.23	697.91
							$7626.80

15

1913						Rate		For.	$ 7626.80
Aug.	1	30389	lbs.	to	Chicago, Ill.	13½c	$ 40.91		
	2	22554	"	"	Denver, Colo.	50c	112.77		
	2	33985	"	"	Winona, Minn.	7½c	24.74		
	4	30572	"	"	Chicago, Ill.	13½c	40.23		
	6	34966	"	"	" "	13½c	45.50		
	6	29592	"	"	Omaha, Nebr.	14c	41.42		
	7	31870	"	"	" "	14c	44.62		
	7	24862	"	"	Minneapolis, Minn.	3c	7.46		
	9	30739	"	"	Des Moines, Ia.	13½c	41.50		
	11	32607	"	"	Omaha, Nebr.	14c	45.65		
	13	32957	"	"	" "	14c	46.15		
	18	31329	"	"	Des Moines, Ia.	13½c	42.30		
	20	34353	"	"	Chicago, Ill.	13½c	45.63		
	23	30672	"	"	" "	13½c	41.04		
	23	31437	"	"	" "	13½c	41.18		
	26	31414	"	"	Omaha, Nebr.	14c	43.98		
	27	30795	"	"	" "	14c	42.98		
	29	30935	"	"	Sioux City, Ia.	14c	43.30		
	30	32131	"	"	Chicago, Ill.	13½c	43.38		834.7
Sept.	3	29875	"	"	Albert Lea, Minn.	11c	32.85		
	4	32969	"	"	Bloomington, Ill.	13½c	44.50		
	10	31618	"	"	Omaha, Nebr.	14c	44.26		
	13	31878	"	"	Chicago, Ill.	13½c	42.39		
	16	31203	"	"	" "	13½c	41.31		
	20	30315	"	"	Omaha, Neb.	14c	42.43		
	25	29637	"	"	Chicago, Ill.	13½c	39.42		
	29	28934	"	"	Winona, Minn.	7½c	21.70		
	30	29885	"	"	Omaha, Nebr.	14c	42.00		
	30	31213	"	"	" "	14c	43.70		
	30	22608	"	"	Minneapolis, Minn.	3c	6.60		401.1
Oct.	1	29696	"	"	Kenosha, Wis.	13½c	40.09		
	2	28694	"	"	Chicago, Ill.	13½c	36.92		
	6	30961	"	"	" "	13½c	41.79		
	7	40250	"	"	" "	13½c	54.41		
	8	28764	"	"	Winona, Minn.	7½c	21.57		
	9	31796	"	"	Omaha, Nebr.	14c	44.51		
	13	29699	"	"	Sioux City, Ia.	14c	42.00		
	27	23734	"	"	Minneapolis, Minn.	3c	7.12		
	29	21310	"	"	Albert Lea, Minn.	11c	23.43		
	29	30568	"	"	Omaha, Nebr.	14c	42.80		
	31	32700	"	"	Bloomington, Ill.	13½c	44.14		398.7
Nov.	1	31206	"	"	Chicago, Ill.	13½c	42.12		
	5	30482	"	"	" "	13½c	39.42		
	10	30878	"	"	Lincoln, Nebr.	20½c	63.30		
	10	32611	"	"	Omaha, Nebr.	14c	45.65		
	13	29372	"	"	Chicago, Ill.	13½c	39.56		
	17	32264	"	"	" "	13½c	43.34		
	18	32568	"	"	" "	13½c	44.28		
	20	32321	"	"	Peoria, Ill.	13½c	43.63		
	21	30382	"	"	Kansas City, Mo.	14c	42.53		
	22	29802	"	"	Chicago, Ill.	13½c	40.23		
	24	32125	"	"	Omaha, Nebr.	14c	44.97		
	24	31095	"	"	Chicago, Ill.	13½c	40.50		
	26	30321	"	"	" "	13½c	42.93		
	27	30445	"	"	Omaha, Nebr.	14c	42.62		
	29	31621	"	"	" "	14c	44.26		659.3
Dec.	1	31993	"	"	Minneapolis, Minn.	3c	9.60		
	2	33271	"	"	Chicago, Ill.	13½c	45.23		
	3	37399	"	"	" "	13½c	48.33		
	4	31413	"	"	" "	13½c	40.64		
	5	33233	"	"	Minneapolis, Minn.	3c	9.97		
	9	32605	"	"	Chicago, Ill.	13½c	43.34		
									$ 9020.8

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						Rate		For. $ 9920.82	List.
1913 Dec.	9	31437	lbs.	to	Chicago, Ill.	13½c	$ 44.42		
	10	32700	"	"	Minneapolis, Minn.	3c	10.01		
	11	41213	"	"	Bloomington, Ill.	13½c	55.64		
	12	30772	"	"	Chicago, Ill.	13½c	42.66		
	13	32593	"	"	" "	13½c	43.20		
	15	43014	"	"	" "	13½c	57.11		
	16	40027	"	"	" "	13½c	53.06		
	17	31422	"	"	" "	13½c	38.48		
	19	37336	"	"	Des Moines, Ia.	15½c	57.88		
	19	32102	"	"	Chicago, Ill.	13½c	43.47		
	23	31008	"	"	Des Moines, Ia.	15½c	48.05		
	24	34044	"	"	Chicago, Ill.	13½c	44.55		
	26	32814	"	"	Springfield, Ill.	13½c	44.30		
	27	36917	"	"	Chicago, Ill.	13½c	49.68		
	29	31929	"	"	" "	13½c	42.12	925.76	
1914 Jan.	2	29911	"	"	Chicago, Ill.	13½c	40.37		
	2	33202	"	"	" "	13½c	46.44		
	5	33486	"	"	St. Paul, Minn.	....	.....		
	5	31158	"	"	Chicago, Ill.	13½c	42.12		
	7	31435	"	"	" "	13½c	42.44		
	8	36499	"	"	" "	13½c	49.27		
	9	35597	"	"	" "	13½c	46.85		
	12	33892	"	"	" "	13½c	46.31		
	12	32165	"	"	" "	13½c	43.42		
	13	20758	"	"	" "	13½c	28.08		
	13	2027	"	"	St. Paul, Minn.	....	.....		
	13	30179	"	"	Chicago, Ill.	13½c	40.74		
	15	39440	"	"	" "	13½c	53.46		
	16	32503	"	"	" "	13½c	43.87		
	16	1498	"	"	St. Paul, Minn.	....	.....		
	17	42644	"	"	Chicago, Ill.	13½c	57.56		
	19	31646	"	"	" "	13½c	43.51		
	20	31377	"	"	Albert Lea, Minn.	11c	34.51		
	20	31868	"	"	Chicago, Ill.	13½c	43.02		
	21	2003	"	"	Albert Lea, Minn.	23c	4.60		
	21	36161	"	"	Omaha, Nebr.	17½c	63.28		
	22	39176	"	"	Chicago, Ill.	13½c	53.19		
	23	30178	"	"	St. Joseph, Mo.	17½c	52.80		
	26	32836	"	"	Chicago, Ill.	13½c	43.29		
	27	31503	"	"	La Crosse, Wis.	7½c	23.63		
	27	32520	"	"	Chicago, Ill.	13½c	44.01		
	26	33318	"	"	" "	13½c	44.42		
	26	32353	"	"	" "	13½c	44.55		
	29	21527	"	"	Aberdeen, S. D.	23c	49.50		
	30	34220	"	"	Chicago, Ill.	13½c	46.85		
	31	32060	"	"	" "	13½c	43.28	1215.37	
Feb.	2	30341	"	"	Chicago, Ill.	13½c	40.95		
	2	30503	"	"	Keokuk, Ia.	15½c	47.27		
	3	32354	"	"	Chicago, Ill.	13½c	43.30		
	4	34894	"	"	Des Moines, Ia.	15½c	54.08		
	4	2010	"	"	Albert Lea, Minn.	23c	4.60		
	5	31005	"	"	Smith Center, Kan.	41c	127.10		
	6	39054	"	"	Springfield, Ill.	13½c	52.72		
	6	4062	"	"	Albert Lea, Minn.	23c	9.35		
	7	33635	"	"	Chicago, Ill.	13½c	45.50		
	9	32216	"	"	" "	13½c	43.50		
	11	33547	"	"	" "	13½c	45.63		
	11	33169	"	"	Omaha, Nebr.	17½c	58.04		
	12	32224	"	"	Chicago, Ill.	13½c	44.15		
	13	30551	"	"	Kansas City, Mo.	17½c	53.45		
	14	33554	"	"	Omaha, Nebr.	17½c	58.72		
	16	30001	"	"	Chicago, Ill.	13½c	40.50		
								$12061.95	

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1914						Rate		For. $12061
Feb.	17	33025	lbs.	to	Omaha, Nebr.	17½c	$ 57.78	
	18	30698	"	"	Chicago, Ill.	13½c	40.97	
	19	31483	"	"	" "	13½c	42.50	
	20	31937	"	"	" "	13½c	43.07	
	21	34126	"	"	La Crosse, Wis.	7½c	25.59	
	21	31579	"	"	Chicago, Ill.	13½c	42.39	
	23	31474	"	"	Minneapolis, Minn.	3c	9.44	
	25	32013	"	"	Chicago, Ill.	13½c	43.22	
	26	38276	"	"	" "	13½c	51.98	
	27	31293	"	"	" "	13½c	42.68	
	27	30452	"	"	Des Moines, Ia.	15½c	47.20	
	28	31911	"	"	Omaha, Neb.	17½c	55.85	
	28	638	"	"	St. Paul, Minn.	....	.....	1271.
Mar.	3	30235	"	"	Iowa Falls, Ia.	13c	39.30	
	3	29451	"	"	Chicago, Ill.	13½c	40.15	
	4	30671	"	"	" "	13½c	41.40	
	5	4716	"	"	St. Paul, Minn.	....	.....	
	5	30072	"	"	Chicago, Ill.	13½c	40.60	
	6	32109	"	"	" "	13½c	44.01	
	6	31738	"	"	" "	13½c	42.84	
	7	31981	"	"	St. Joseph, Mo.	17½c	55.96	
	9	31086	"	"	Chicago, Ill.	13½c	41.96	
	10	1984	"	"	St. Paul	....	.....	
	10	25377	"	"	Minneapolis, Minn.	3c	7.61	
	11	31324	"	"	Chicago, Ill.	13½c	41.85	
	11	29509	"	"	" "	13½c	39.96	
	12	31851	"	"	" "	13½c	43.00	
	12	33053	"	"	" "	13½c	43.47	
	13	31131	"	"	Sioux City, Ia.	17c	52.93	
	14	1063	"	"	Rochester, Minn.	26c	2.76	
	14	31919	"	"	Omaha, Nebr.	17½c	55.86	
	14	29576	"	"	Chicago, Ill.	13½c	39.96	
	16	31715	"	"	" "	13½c	42.82	
	16	30075	"	"	Decatur, Ill.	13½c	40.60	
	17	24853	"	"	Chicago, Ill.	13½c	33.55	
	17	20766	"	"	Minneapolis, Minn.	3c	6.23	
	18	32464	"	"	Chicago, Ill.	13½c	44.44	
	18	30795	"	"	St. Joseph, Mo.	17½c	53.90	
	19	32834	"	"	Chicago, Ill.	13½c	44.33	
	20	31962	"	"	" "	13½c	43.47	
	21	32020	"	"	" "	13½c	43.20	
	21	30454	"	"	" "	13½c	42.80	
	23	31056	"	"	" "	13½c	41.92	
	23	29846	"	"	" "	13½c	40.29	
	24	31211	"	"	" "	13½c	42.13	
	24	31345	"	"	" "	13½c	43.74	
	25	27092	"	"	" "	13½c	35.10	
	25	4070	"	"	Albert Lea, Minn.	23c	9.36	
	26	30097	"	"	Chicago, Ill.	13½c	42.26	
	26	30678	"	"	" "	13½c	41.41	
	27	22640	"	"	Waseca, Minn.	9½c	21.51	
	28	29999	"	"	Chicago, Ill.	13½c	40.77	
	28	29211	"	"	" "	13½c	39.43	
	30	1738	"	"	St. Paul, Minn.	....	.....	
	30	30683	"	"	Chicago, Ill.	13½c	40.23	
	30	29864	"	"	Omaha, Nebr.	17½c	52.26	1559.3
Apr.	1	21730	"	"	Minneapolis, Minn.	3c	6.52	
	1	20074	"	"	Chicago, Ill.	13½c	27.10	
	2	23795	"	"	La Salle, Ill.	13½c	32.12	
	2	2060	"	"	St. Paul, Minn.	....	.....	
	4	22063	"	"	Chicago, Ill.	13½c	29.77	
	6	21998	"	"	" "	13½c	28.35	
	7	22438	"	"	" "	13½c	30.29	
	9	20859	"	"	" "	13½c	28.16	
								$14892.3

8 List.

						Rate		For. $14892.84
914								
Apr.	9	23299	lbs.	to	Chicago, Ill.	13½c	$ 31.45	
	10	7024	"	"	Albert Lea, Minn.	23c	4.65	
	10	22458	"	"	Chicago, Ill.	13½c	28.76	
	10	5205	"	"	St. Paul, Minn.	....	.....	
	11	21861	"	"	Chicago, Ill.	13½c	29.51	
	11	20715	"	"	Sioux Falls, S. D.	17c	35.22	
	11	24255	"	"	Omaha, Nebr.	17½c	42.45	
	13	21333	"	"	Sioux City, Ia.	17c	36.26	
	14	21347	"	"	Chicago, Ill.	13½c	29.03	
	14	22564	"	"	" "	13½c	30.24	
	14	21035	"	"	" "	13½c	27.00	
	15	21886	"	"	Albert Lea, Minn.	11c	24.06	
	16	20338	"	"	Chicago, Ill.	13½c	27.45	
	16	23157	"	"	" "	13½c	29.70	
	17	22085	"	"	" "	13½c	28.22	
	17	23674	"	"	" "	13½c	30.78	
	18	23353	"	"	" "	13½c	30.78	
	18	19989	"	"	" "	13½c	27.00	
	20	699	"	"	St. Paul, Minn.	....	.....	
	20	20080	"	"	Chicago, Ill.	13½c	28.08	
	20	22509	"	"	" "	13½c	30.38	
	21	21732	"	"	" "	13½c	29.03	
	21	19956	"	"	" "	13½c	27.00	
	22	21383	"	"	" "	13½c	27.81	
	21	21158	"	"	" "	13½c	28.56	
	22	21476	"	"	" "	13½c	27.89	
	22	20614	"	"	" "	13½c	27.54	
	24	20669	"	"	" "	13½c	27.54	
	24	20106	"	"	" "	13½c	30.24	
	24	22423	"	"	" "	13½c	30.38	
	27	22633	"	"	Omaha, Nebr.	17½c	39.61	
	28	19648	"	"	Chicago, Ill.	13½c	27.00	
	29	20093	"	"	" "	13½c	27.00	
	29	1162	"	"	Waseca, Minn.	21c	2.44	
	29	19759	"	"	Chicago, Ill.	13½c	27.00	
	30	20375	"	"	" "	13½c	27.50	1139.87
May	1	21155	"	"	Chicago, Ill.	13½c	28.55	
	1	19734	"	"	" "	13½c	27.00	
	2	20257	"	"	" "	13½c	27.00	
	2	19436	"	"	" "	13½c	27.00	
	4	22096	"	"	" "	13½c	29.83	
	4	20701	"	"	" "	13½c	27.94	
	4	20867	"	"	" "	13½c	28.89	
	5	21890	"	"	" "	13½c	29.57	
	6	21388	"	"	Omaha, Nebr.	17½c	37.44	
	7	750	"	"	St. Paul, Minn.	....	.....	
	7	22132	"	"	Chicago, Ill.	13½c	29.03	
	7	21314	"	"	" "	13½c	28.54	
	8	22340	"	"	" "	13½c	30.11	
	9	20490	"	"	" "	13½c	27.41	
	11	22509	"	"	" "	13½c	30.65	
	11	20570	"	"	" "	13½c	27.77	
	12	21876	"	"	" "	13½c	28.62	
	13	21593	"	"	" "	13½c	28.76	
	13	21678	"	"	" "	13½c	29.26	
	14	21523	"	"	Omaha, Nebr.	17½c	37.66	
	14	30138	"	"	La Crosse, Wis.	7½c	22.60	
	15	20637	"	"	Sioux City, Ia.	17½c	35.08	
	16	21839	"	"	Chicago, Ill.	13½c	29.03	
	16	19849	"	"	" "	13½c	27.00	

	18	21273	"	"	"	"	13½c	29.03	
	19	18931	"	"	"	"	13½c	27.00	
	19	21021	"	"	"	"	13½c	27.00	
	20	20677	"	"	"	"	13½c	27.68	
	21	21006	"	"	"	"	13½c	28.47	
									$16032.7

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					Rate		For. 16032.7
1914							
May	22	20804 lbs.	to	Chicago, Ill.	13½c	$ 28.01	
	22	21989 "	"	Omaha, Nebr.	17½c	38.47	
	23	918 "	"	St. Paul, Minn.	....	.....	
	25	22043 "	"	Chicago, Ill.	13½c	27.95	
	25	4974 "	"	St. Paul, Minn.	....	.....	
	27	19419 "	"	Chicago, Ill.	13½c	27.00	
	23	20983 "	"	" "	13½c	28.30	
	28	24873 "	"	" "	13½c	33.58	
	28	20368 "	"	" "	13½c	27.50	
	29	21197 "	"	Leavenworth, Kans.	17½c	37.09	
	29	20295 "	"	Chicago, Ill.	13½c	27.40	1089.2
June	1	2207 "	"	St. Paul, Minn.	....	.....	
	1	19920 "	"	Chicago, Ill.	13½c	27.00	
	1	21140 "	"	" "	13½c	28.54	
	3	2132 "	"	Albert Lea, Minn.	23c	4.90	
	3	20350 "	"	Chicago, Ill.	13½c	27.47	
	3	20982 "	"	" "	13½c	28.32	
	4	21035 "	"	Burlington, Ia.	13½c	28.40	
	4	1675 "	"	St. Paul, Minn.	....	.....	
	4	20965 "	"	Chicago, Ill.	13½c	28.30	
	5	21535 "	"	" "	13½c	29.07	
	5	21328 "	"	" "	13½c	28.79	230.7
							$17352.7

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					Rate		For. 17352.7
1914							
June	6	22065 lbs.	to	Chicago, Ill.	13½c	$ 29.78	
	9	26627 "	"	" "	13½c	35.95	
	8	21153 "	"	" "	"	28.55	
	9	21998 "	"	" "	"	29.70	
	11	21376 "	"	" "	"	28.86	
	10	21017 "	"	" "	"	28.37	
	12	20197 "	"	" "	"	27.28	
	12	20089 "	"	" "	"	27.14	
	13	21042 "	"	" "	"	28.40	
	13	31362 "	"	" "	"	42.34	
	15	20607 "	"	Sioux City, Ia.	16c	32.97	
	17	21652 "	"	Chicago, Ill.	13½c	29.23	
	16	2085 "	"	Albert Lea, Minn.	23c	4.80	
	17	19646 "	"	Chicago, Ill.	13½c	27.00	
	17	21573 "	"	" "	"	29.13	
	18	20618 "	"	Omaha, Nebr.	17½c	36.08	
	19	28792 "	"	Chicago, Ill.	13½c	38.87	
	22	23816 "	"	Omaha, Nebr.	17½c	41.68	
	23	20006 "	"	Chicago, Ill.	13½c	27.00	
	23	19813 "	"	" "	"	27.00	
	24	27857 "	"	" "	"	37.60	
	25	20975 "	"	" "	"	28.32	
	26	27742 "	"	Winona, Minn.	7½c	22.50	
	29	20188 "	"	Chicago, Ill.	13½c	27.25	

	30	20521	"	" Kansas City, Mo.	17½c	43.80		List.
	30	22739	"	" Sioux City, Ia.	16c	36.38		
	30	21326	"	" Mankato, Minn.	8.3c	17.70	813.68	
July	3	21009	"	" Chicago, Ill.	13½c	28.37		
	2	20782	"	" Minneapolis, Minn.	3c	6.23		
	3	22690	"	" Omaha, Nebr.	17½c	39.70		
	6	20619	"	" " "	"	36.08		
	6	20160	"	" Chicago, Ill.	13½c	27.15		
	7	21594	"	" " "	"	29.15		
	7	2103	"	" Albert Lea, Minn.	23c	4.84		
	9	24436	"	" Chicago, Ill.	13½c	32.99		
	10	26932	"	" " "	"	36.35		
	11	20981	"	" " "	"	28.32		
	13	24860	"	" " "	"	33.56		
	15	20635	"	" Omaha, Nebr.	17½c	36.11		
	16	21528	"	" Chicago, Ill.	13½c	29.07		
	14	20997	"	" " "	"	28.35		
	17	22126	"	" Omaha, Nebr.	17½c	38.72		
	22	19920	"	" Chicago, Ill.	13½c	27.00		
	23	25897	"	" Winona, Minn.	7½c	22.50		
	25	31751	"	" Chicago, Ill.	13½c	42.87		
	29	25289	"	" Omaha, Nebr.	17½c	44.26		
	27	23094	"	" " "	17½c	40.41	612.03	
Aug.	5	22672	"	" Omaha, Nebr.	17½c	39.68		
	6	24372	"	" " "	"	42.65		
	12	22344	"	" Albert Lea, Minn.	9½c	21.24		
	18	24558	"	" Chicago, Ill.	13½c	33.15		
	17	2594	"	" Albert Lea, Minn.	23c	5.97		
	28	23656	"	" Chicago, Ill.	13½c	31.93		
	26	34339	"	" Winona, Minn.	7½c	25.76		
	29	24979	"	" Omaha, Nebr.	17½c	43.72		
	28	1069	"	" Albert Lea, Minn.	23c	2.45	246.55	
Sept.	2	20270	"	" Chicago, Ill.	13½c	27.37		
	3	21338	"	" Peoria, Ill.	"	28.80		
	5	20311	"	" Chicago, Ill.	"	27.42		
	9	23554	"	" " "	"	31.80		
	15	22549	"	" " "	"	30.45		
	16	21190	"	" Omaha, Nebr.	17½c	37.08		
	16	22283	"	" Chicago, Ill.	13½c	30.08		
	18	1058	"	" Rochester, Minn.	26c	2.75		
	17	21524	"	" Springfield, Ill.	13½c	29.06	244.81	
							$19269.79	

21

1914					Rate		For. $19269.79	
Sept.	18	22904	lbs.	to Omaha, Nebr.	17½c	$ 40.23		
	23	20355	"	" Peoria, Ill.	13½c	27.48		
	23	19880	"	" Chicago, Ill.	13½c	27.00		
	26	21843	"	" Omaha, Nebr.	17½c	38.23		
	29	2616	"	" Albert Lea, Minn.	23c	6.01	138.95	
Oct.	3	27072	"	" Chicago, Ill.	13½c	36.55		
	5	26085	"	" Winona, Minn.	7½c	22.50		
	7	24489	"	" Omaha, Nebr.	17½c	42.85		
	8	22536	"	" Des Moines, Ia.	15½c	34.93		
	9	22813	"	" Omaha, Nebr.	17½c	39.92		
	10	26285	"	" Chicago, Ill.	13½c	35.48		
	13	20302	"	" Omaha, Nebr.	17½c	35.53	247.76	
							$19656.50	

tion, Nov. 25,

22 And the plaintiff avers that during said period of time, to-wit, from September 1st, 1912 down to the date of the filing of this suit, he was compelled, in order to have the excelsior and tow so manufactured by him, as aforesaid, carried and transported to the various persons, firms and corporations in the various states of the United States, to whom he sold and shipped the same, to patronize the said defendant corporations, or some of them, as they embraced all the common carriers that transported and carried freight by railroad from St. Paul, Minnesota to the said various points in the United States to which the plaintiff shipped excelsior and tow, as aforesaid.

And the plaintiff further avers that the direct effect and consequence of said conspiracy in this count mentioned, was that there was paid to said defendants, or some of them, to have said excelsior and tow carried and transported to said various points in the various states of the United States, as aforesaid, a much larger sum of money than would have been paid to or collected by said defendant corporation if no such conspiracy existed, to-wit, the sum of Five Thousand Dollars ($5000), as follows:

23 List.

Shipped from St. Paul, Minn., to various points named below.
30 cars to Chicago)
July 1, 1913, to Dec. 1, 1913.)

Date		lbs.	Advanced rate	Freight paid	Former rate	Over-charge	Over-charge $ 315.88
July	9	32129	13½c	$ 42.93	10c	$ 10.80	
	16	33107	"	40.50	"	7.40	
	18	31389	"	41.85	"	10.47	
	19	30443	"	41.85	"	11.41	
	21	33474	"	45.18	"	11.70	
	22	31484	"	42.50	"	11.02	
	28	31323	"	42.12	"	10.80	
	28	29739	"	40.15	"	10.15	
Aug.	1	30389	"	40.91	"	10.52	
	4	30572	"	40.23	"	9.66	
	6	34966	"	45.50	"	10.53	
	20	34354	"	45.63	"	11.28	
	23	30672	"	41.04	"	10.37	
	23	31437	"	41.18	"	10.74	
	30	32151	"	43.30	"	11.25	
Sept.	13	31878	"	42.39	"	10.51	
	16	31203	"	41.31	"	10.11	
	25	29637	"	39.42	"	9.78	
Oct.	1	29676	"	40.09	"	10.09	
	2	28694	"	36.92	"	6.92	
	6	30961	"	41.79	"	10.83	
	7	40250	"	54.41	"	14.16	
Nov.	1	31266	"	42.12	"	10.86	
	5	30482	"	39.42	"	8.94	
	13	29372	"	39.56	"	9.56	
	17	32264	"	43.34	"	11.08	
	18	32568	"	44.28	"	12.70	
	22	29802	"	40.23	"	10.23	
	24	31095	"	40.50	"	9.40	
	26	30321	"	42.93	"	12.61	
						181.57	

17 cars to Chicago and Missouri River)
Dec. 1, to 31, 1913.)

Dec.	2	33271	13½c	45.23	10c	12.96	
	3	37399	"	48.33	"	10.93	
	4	31413	"	40.64	"	9.23	
	9	32605	"	43.34	"	10.74	
	9	31437	"	44.42	"	12.98	
	12	30772	"	42.66	"	11.89	
	13	32593	"	43.20	"	10.60	
	15	43014	"	57.11	"	14.10	
	16	40027	"	53.06	"	13.04	
	17	31422	"	38.48	"	7.06	
	19	37336	15½c	57.88	13½c	7.46	
	19	32102	13½c	43.47	10c	11.37	
	23	31008	15½c	48.05	13½c	6.20	
	24	34044	13½c	44.55	10c	10.51	
	27	36917	"	49.68	"	12.76	
	29	31929	"	42.12	"	10.20	
	29	31778	17c	54.02	14c	9.54	
						181.57	
							$ 497.45

24

79 Cars (30M) Chicago and Mo. River)
")
Jan. 1 to April 1, 1914.)

Over-charge

Forwarded $497.4
879.0

Date		lbs.	Advanced rate	Freight paid	Former rate	Over-charge
Jan.	2	29911	13½c	$ 40.37	10c	$ 10.47
	2	33202	"	46.44	"	13.24
	5	31158	"	42.12	"	10.97
	7	31435	"	42.44	"	11.02
	8	37499	"	49.27	"	12.77
	9	35597	"	46.85	"	11.25
	12	33892	"	46.31	"	12.41
	12	32165	"	43.42	"	11.26
	13	20758	"	28.08	"	7.33
	13	30179	"	40.74	"	10.56
	15	39440	"	53.46	"	14.02
	16	32503	"	43.87	"	11.37
	17	42644	"	57.56	"	14.92
	19	31646	"	43.51	"	11.87
	20	31868	"	43.02	"	11.66
	21	36161	17½c	63.28	14c	12.63
	22	39176	13½c	53.19	10c	14.02
	23	30178	17½c	52.80	14c	10.57
	26	32836	13½c	43.29	10c	11.46
	27	32520	"	44.01	"	11.49
	26	33318	"	44.42	"	11.10
	26	32353	"	44.55	"	12.20
	30	34220	"	46.85	"	12.63
	31	32060	"	43.28	"	11.22
Feb.	2	30341	"	40.95	"	10.61
	2	30503	15½c	47.27	12½c	9.15
	3	32354	13½c	43.30	10c	10.95
	4	34874	15½c	54.08	13½c	6.98
	7	33635	13½c	45.50	10c	11.87
	9	32216	"	43.50	"	11.29
	11	33547	"	45.63	"	12.09
	11	33169	17½c	58.04	14c	11.61
	12	32224	13½c	44.15	10c	11.93
	13	30551	17½c	53.45	14c	10.67
	14	33554	17½c	58.72	14c	11.73
	16	30001	13½c	40.50	10c	10.50
	17	33025	17½c	57.78	14c	11.55
	18	30698	13½c	40.97	10c	10.27
	19	31483	"	42.50	"	11.02
	20	31937	"	43.07	"	11.13
	21	31579	"	42.39	"	10.81
	25	321013	"	43.22	"	11.20
	26	38276	"	51.98	"	13.70
	27	31293	"	42.68	"	11.38
	27	30452	15½c	47.20	13½c	6.08
	28	31911	17½c	55.85	14c	13.03
Mar.	3	29451	13½c	40.15	10c	10.70
	4	30671	"	41.40	"	10.73
	5	30072	"	40.60	"	10.53
	6	32109	"	44.01	"	11.91
	6	31738	"	42.84	"	11.10
	7	31981	17½c	55.96	14c	11.20

	9	31086	13½c	41.96	10c	10.88	List.
	11	31324	"	41.85	"	10.53	
	11	29509	"	39.96	"	10.46	
	12	31851	"	42.00	"	11.15	
	12	33053	"	43.47	"	10.42	
	13	31131	17c	52.93	14c	9.33	
	14	31919	17½c	55.86	"	11.20	
	14	29576	13½c	39.96	10c	10.39	
	16	31715	"	42.82	"	11.10	
	17	24853	"	33.55	"	8.70	
						$ 1376.50	

25

Date		lbs.	Advanced rate	Freight paid	Former rate	Forwarded Over-charge	Over-charge $1376.50
Mar.	18	32464	13½c	$ 44.44	10c	$ 11.98	
	18	30795	17½c	53.90	14c	10.78	
	19	32834	13½c	44.33	10c	11.50	
	20	31962	"	43.47	"	11.51	
	21	32020	"	43.20	"	11.18	
	21	30454	"	42.80	"	12.35	
	23	31056	"	41.92	"	10.87	
	23	29846	"	40.29	"	10.45	
	24	31211	"	42.13	"	10.92	
	24	31345	"	43.74	"	12.40	
	25	27092	"	35.10	"	8.01	
	26	30097	"	42.26	"	12.13	
	26	30678	"	41.41	"	10.74	
	28	29099	"	40.77	"	10.77	
	28	29211	"	39.43	"	10.22	
	30	30683	"	40.23	"	9.55	
	30	29864	17½c	52.26	14c	10.47	
						$879.05	
	77 cars (20 M) April 1 to June 5, 1914.		Chicago and Mo. River				574.11
Apr.	1	20074	13½c	27.10	10c	7.03	
	4	22053	"	29.77	"	7.72	
	6	21998	"	28.35	"	6.35	
	7	22438	"	30.29	"	7.86	
	9	20859	"	28.16	"	7.30	
	9	23299	"	31.45	"	8.15	
	10	22458	"	28.76	"	6.31	
	11	21861	"	29.51	"	7.65	
	11	20715	17c	35.22	14c	6.21	
	11	24255	17½c	42.45	"	8.47	
	13	21333	17c	36.26	"	6.39	
	14	21347	13½c	29.03	10c	7.46	
	14	22564	"	30.24	"	7.88	
	14	21035	"	27.00	"	7.35	
	16	20338	"	27.45	"	7.12	
	16	23157	"	29.70	"	6.55	
	17	22085	"	28.22	"	6.14	
	17	23674	"	30.78	"	7.11	
	18	23353	"	30.78	"	7.23	
	18	19989	"	27.00	"	7.00	
	20	20080	"	28.08	"	8.00	

	20	22509	"	30.38	"	7.88
	21	21732	"	29.03	"	7.03
	21	19956	"	27.00	"	7.00
	21	21158	"	28.56	"	7.41
	22	21383	"	27.81	"	6.48
	22	21476	"	27.89	"	6.42
	22	20614	"	27.54	"	6.93
	24	20669	"	27.54	"	6.88
	24	20106	"	30.24	"	10.14
	24	22423	"	30.38	"	7.96
	27	22633	17½c	39.61	14c	7.91
	28	19648	13½c	27.00	10c	7.00
	29	20093	"	27.00	"	6.90
	29	19759	"	27.00	"	7.00
	30	20375	"	27.50	"	7.12
May	1	21155	"	28.55	"	7.40
	2	20257	"	27.00	"	6.95
	1	19734	"	27.00	"	7.00
	2	19436	"	27.00	"	7.00
	4	22096	"	29.83	"	7.73
	4	20701	"	27.94	"	7.24
	4	20867	"	28.89	"	8.02
	5	21899	"	29.57	"	7.67

$ 1950.61

26

Date		lbs.	Advanced rate	Freight paid	Former rate	Forwarded Over-charge	Over-charge $ 1950.61
May	6	21388	17½c	$ 37.44	14c	$ 7.49	
	7	22132	13½c	29.03	10c	7.73	
	7	21314	"	28.54	"	7.23	
	8	22340	"	30.11	"	7.77	
	9	20490	"	27.41	"	6.91	
	11	22509	"	30.65	"	8.15	
	11	20570	"	27.77	"	7.20	
	12	21876	"	28.62	"	6.75	
	13	21593	"	28.76	"	7.16	
	13	21678	"	29.26	"	7.58	
	14	21523	17½c	37.66	14c	7.53	
	15	20637	17c	35.08	"	6.18	
	16	21839	13½c	29.03	10c	7.20	
	16	19849	"	27.00	"	7.00	
	18	21273	"	29.03	"	7.86	
	19	18931	"	27.00	"	7.00	
	19	21021	"	27.00	"	5.98	
	20	20677	"	27.68	"	7.01	
	21	21096	"	28.47	"	7.37	
	22	20804	"	28.01	"	7.21	
	22	21989	17½c	38.47	14c	7.70	
	23	20983	13½c	28.30	10c	7.30	
	25	22043	"	27.95	"	5.90	
	27	19419	"	27.00	"	7.00	
	28	24873	"	33.58	"	8.70	
	28	20368	"	27.50	"	7.13	
	29	21197	17½c	37.09	14c	7.42	
	29	20295	13½c	27.40	10c	7.10	
June	1	19920	"	27.00	"	7.00	

1	21140	"	28.54	"	7.40	List.
3	20350	"	27.47	"	7.12	
3	20982	"	28.32	"	7.32	
4	20965	"	28.30	"	7.30	
5	21535	"	29.07	"	7.53	
5	21328	"	28.79	"	7.46	
						$ 1950.61

27

61 Cars (20 M) additional Chicago and Mo. River)
June 6 to October 13, 1914.)

Date		lbs.	Advanced rate	Freight paid	Former rate	Forwarded Over-charge	Over-charge $ 1950.61
June	6	22065	13½c	$ 29.78	10c	$ 7.72	
	9	26627	"	35.95	"	9.33	
	8	21153	"	28.55	"	7.40	
	9	21998	"	29.70	"	7.70	
	11	21376	"	28.86	"	7.48	
	10	21017	"	28.37	"	7.35	
	12	20197	"	27.28	"	7.08	
	12	20089	"	27.14	"	7.05	
	13	21042	"	28.40	"	7.35	
	13	31362	"	42.34	"	11.08	
	15	20607	16c	32.97	14c	4.12	
	17	21652	13½c	29.23	10c	7.58	
	17	19646	"	27.00	"	7.00	
	17	21573	"	29.13	"	7.56	
	18	20618	17½c	36.08	14c	7.22	
	19	28792	13½c	38.87	10c	10.07	
	22	23816	17½c	41.68	14c	8.23	
	23	20096	13½c	27.00	10c	7.00	
	23	19813	"	27.00	"	7.00	
	24	27857	"	37.60	"	9.75	
	25	20975	"	28.32	"	7.34	
	29	20188	"	27.25	"	7.23	
	30	20521	17½c	43.80	14c	7.17	
	30	22739	16c	36.38	"	4.54	
July	3	21009	13½c	28.37	10c	7.37	
	3	22690	17½c	39.70	14c	7.94	
	6	20619	"	36.08	"	7.20	
	6	20160	13½c	27.15	10c	7.00	
	7	21594	"	29.15	"	7.55	
	9	24436	"	32.99	"	8.55	
	10	26932	"	36.35	"	9.42	
	11	20981	"	28.32	"	7.33	
	13	24860	"	33.56	"	8.70	
	15	20635	17½c	36.11	14c	7.12	
	16	21528	13½c	29.07	10c	7.55	
	14	20997	"	28.35	"	7.35	
	17	22126	17½c	38.72	14c	7.73	
	22	19920	13½c	27.00	10c	7.00	
	25	21731	"	42.87	"	11.12	
	29	25289	17½c	44.26	14c	8.85	
	27	23094	"	40.41	"	8.05	
Aug.	5	22672	"	39.68	"	7.94	
	6	24372	"	42.65	"	8.51	
	18	24558	13½c	33.15	10c	8.60	

	28	23656	"	31.93	"	8.28
	29	24979	17½c	43.72	14c	8.75
Sept.	2	20270	13½c	27.37	10c	7.10
	5	20311	"	27.42	"	7.11
	9	23554	"	31.80	"	8.25
	15	22549	"	30.45	"	7.90
	16	21190	17½c	37.08	14c	7.41
	16	22283	13½c	30.08	10c	7.80
	18	22904	17½c	40.23	14c	8.01
	23	19880	13½c	27.00	10c	7.00
	26	21843	17½c	38.23	14c	7.63
Oct.	3	27072	13½c	36.55	10c	9.48
	7	24489	17½c	42.85	14c	8.54
	8	22536	15½c	34.93	13½c	4.50
	9	22813	17½c	39.92	14c	7.98
	10	26285	13½c	35.48	10c	9.20
	13	20302	17½c	35.53	14c	7.11
					Total—	$ 2447.0

28 by means whereof, the profits of the plaintiff upo his said business, as aforesaid, during the period afore said, to-wit, from September 1st, 1912, down to the date of th filing of this suit, were decreased in a corresponding sum, to wit, in the sum of Five Thousand Dollars ($5000.00); to th damage of the plaintiff by reason of the matters and thing in this count mentioned, of a large sum of money, to-wit, i the sum of Five Thousand Dollars ($5000.00).

And Whereas, Also, heretofore, to-wit, on September 1st 1912, and for several years prior thereto, the plaintiff was and continuously ever since has been, engaged in the busi ness of manufacturing and selling excelsior and tow, the same being useful and valuable articles of merchandise, with hi principal office and place of business in Chicago, in said East ern Division of the Northern District of Illinois, and on to-wit, September 1st, 1912, and for three years immediately prior thereto, and continuously ever since, owned and oper ated a factory at St. Paul, in the state of Minnesota, where he manufactured and excelsior and tow, which said produ ucts, the same being useful and valuable articles of merchan dise, so manufactured by the plaintiff at St. Paul, Minnesota as aforesaid, during said period, to-wit, from the year 190 continuously to the present time, were sold and shipped by the plaintiff from St. Paul, Minnesota, to various persons firms and corporations in the several states of the United States, in interstate trade and commerce, within the meanin of the act of Congress of July 2nd, 1890, entitled, "An Act t Protect Trade and Commerce Against Unlawful Restraint and Monopolies."

29 And the plaintiff avers that the said defendant co

porations during the period of time in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, were common carriers and competing interstate railway companies, engaged in the business of carrying and transporting passengers and freight traffic by railroad from St. Paul, Minnesota, to various points in the several states of the United States, and were, during the period aforesaid, engaged in trade and commerce among the several states of the United States within the meaning of the said act of Congress approved July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and said individual defendants were, during the period aforesaid, the officers, agents and employes of the said defendant corporations, or some of them, and engaged in carrying on the said business of the said defendant corporations. Declarat filed N 1914.

And the plaintiff avers that during the period of time mentioned in this count, to-wit, September 1st, 1912, to the time of the filing of this suit, at St. Paul, in the state of Minnesota, he manufactured and shipped large quantities of excelsior and tow, to-wit, 10,000 tons, to various persons, firms and corporations in the several states of the United States, and that there was paid to the said defendant corporations, or some of them, for carrying and transporting said excelsior and tow so shipped by the plaintiff, as aforesaid, large sums of money, to wit, the sum of twenty-five Thousand Dollars ($25,000).

And the plaintiff further avers that because said defendant corporations before and throughout the period in this count mentioned, to-wit, from September 1st, 1912 to the date of the filing of this suit, were separate and distinct from each other, that their said interstate business, trade and commerce should have been conducted strictly on a competitive basis, and would have been so conducted but for the unlawful conspiracy and combination in this count mentioned.

30 And the plaintiff further avers that on, to-wit, September 1st, 1912, and for several years prior thereto, there was maintained, and continuously ever since has been maintained, an association known as "The Western Trunk Line Committee"; that said association has offices in the city of Chicago in the said Eastern Division of the Northern District of Illinois, and employs a large clerical force, the expenses whereof are paid by the members of said association either in proportion to the mileage of the respective railway com-

n. v. 25. panies, or according to some other basis agreed upon; that the members of said association are common carriers and competing interstate railway companies engaged in the business of carrying and transporting passengers and freight traffic by railroad to various points in the several states of the United States in interstate commerce; that the principal object of said association is to agree upon, fix, maintain and publish uniform, arbitrary and noncompetitive freight rates for the carriage and transportation of freight traffic by railroad to competing points in the several states of the United States; that said association has a chairman, a secretary and certain other officers; that said association has adopted rules and regulations governing its actions and the conduct of its members, the exact terms of said rules and regulations being unknown to the plaintiff, but the plaintiff avers that the said rules and regulations provide among other things, that meetings shall be held from time to time to discuss and agree upon freight rates to be charged for the carriage and transportation of freight traffic to competing points; that each member of said association shall be en-
31 titled to one vote on all questions relating to rates on freight traffic to points where the railway line of such member touches; that the unanimous vote of the members voting thereon shall be necessary to fix or change a freight rate; that the members of said association shall abide by the decision of the association and shall maintain, charge and publish the freight rates fixed and agreed upon by said association; that any member refusing or neglecting to maintain; charge and publish the rates in freight traffic so fixed by the said association, shall be expelled and shall suffer other penalties.

And the plaintiff avers that throughout the period in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, the said defendant corporations were members of said Western Trunk Line Committee, and that said defendant corporations through their respective representatives, and certain of said individual defendants as officers, agents or employees of said defendant corporations, as members of said Western Trunk Line Committee met from time to time in Chicago, in said Eastern Division of the Northern District of Illinois, and agreed upon, fixed, maintained and published freight rates on freight traffic to various competing points in the various states of the United States; that said freight rates so agreed upon, as aforesaid, were arbitrary, uniform, unreasonable and noncompetitive,

and not based on what would be a fair remunerative rate to the carrier transporting such freight traffic; that said defendant coporations charged. maintained and published said arbitrary, uniform, unreasonable and non-competitive freight rates in violation of said act of Congress of July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." Declar filed 1914.

32 And the plaintiff avers that throughout the period of time in this count mentioned, to-wit, from September 1st, 1912, to the date of the filing of this suit, said defendant corporations and the said individual defendants acting as the officers, agents and employes of the defendant corporations or some of them, carried on their said business in interstate trade and commerce in accordance with, and under the plan of said association, known as "The Western Trunk Line Committee," and all competition as to freight rates charged for the carriage and transportation of excelsior and tow from St. Paul, Minnesota to various points in the several states of the United States, which theretofore existed between the defendant corporations, was prevented, eliminated and destroyed by the fixing of arbitrary, uniform and non-competitive freight rates for the transportation of said excelsior and tow so manufactured and shipped by the plaintiff, as aforesaid, in his said business, trade and commerce, the said freight rates so fixed being greatly in excess of the freight rates which, but for the said unlawful conspiracy, would have prevailed for the transportation of said excelsior and tow from St. Paul, Minnesota, to said various other points in interstates commerce.

And the plaintiff avers that in, to-wit, November 1909, and for several years prior thereto, the said defendant corporations maintained, published and charged for the carriage and transportation of tow from St. Paul, Minnesota, to various points in the various states of the United States, with a minimum loading of 30,000 pounds per car, freight rates as follows, to-wit:

From St. Paul, Minn. to Chicago, Ill. per 100 lbs. 10c.
From St. Paul, Minn. to St. Louis Mo. per 100 lbs, 12½c.
From St. Paul, Minn. to Des Moines, Ia. per 100 lbs. 12½c.
From St. Paul, Minn. to Missouri River Points per 100 lbs. 14c.

33 That in, to-wit, said November, 1909, the plaintiff purchased in the city of St. Paul, Minnesota, a site for a tow and excelsior mill, and in, to-wit, the year 1910, built and constructed a tow and excelsior mill and installed ma-

25. chinery and equipment proper and necessary to operate a tow and excelsior mill, and in, to-wit, the said year 1910, the plaintiff began the manufacture of excelsior and tow in his said mill and sold and shipped the same to various persons, firms and corporations in the various states of the United States; that the plaintiff expended in the construction of said tow and excelsior mill, including its machinery and equipment, a large sum of money, to-wit, Sixty Thousand Dollars ($60,000), which, at the time said tow mill was constructed and equipped, was the reasonable value of said mill.

And the plaintiff further avers that from, to-wit, the year 1910, to the date of the filing of this suit, he has manufactured and shipped in interstate trade and commerce, an average of 9,000 tons of excelsior and tow per year, and that the net profit per ton on said excelsior and tow so manufactured and shipped by the plaintiff, as aforesaid, from, to-wit, 1909 to the date of the entering into of the unlawful combination and conspiracy in this count mentioned, to-wit, to September 1st, 1912, was One Dollar ($1.00); that on, to-wit, September 1st, 1912, when the defendants entered into the unlawful combination and conspiracy in this count mentioned, the said defendant corporations increased the freight rates on excelsior and tow from St. Paul, Minnesota, to various points in the United States, and published, maintained and charged for said transportation, with a minimum loading of 20,000 pounds per car, the following rates, to-wit:

34 From St. Paul, Minn. to Chicago, Ill. per 100 lbs. 13½c
From St. Paul, Minn. to St. Louis, Mo. per 100 lbs. 18c
From St. Paul, Minn. to Des Moines, Ia. per 100 lbs. 18c
From St. Paul, Minn. to Missouri River Points per 100 lbs. 22c

That said freight rates were not competitive rates, but were the result of said unlawful combination and conspiracy, and that by means of said combination all competition on said freight rates was annulled, abolished and destroyed by said defendants, and that arbitrary, uniform, excessive and non-competitive rates were published, maintained and charged by said defendant corporations, and that from the time of the entering into of said combination and conspiracy, to-wit, from September 1st, 1912, to the date of the filing of this suit, the said defendant corporations have exacted and collected for the transportation and carriage of excelsior and

tow from St. Paul, Minnesota, to said various points in the United States, said unlawful rates. Declar filed 1914.

And the plaintiff avers that during said period of time, to-wit, from September 1st, 1912, to the date of the filing of this suit, he was compelled, in order to have the excelsior and tow so manufactured by him, as aforesaid, carried and transported to the various persons, firms and corporations in the various states of the United States to whom he sold and shipped the same, to patronize the said defendant corporations, or some of them, as they embraced all the common carriers which transported and carried freight by railroad from St. Paul, Minnesota to the various points in the United States to which the plaintiff shipped excelsior and tow, as aforesaid.

And the plaintiff avers that the direct effect and consequence of the conspiracy in this count mentioned, was that the net profits of the plaintiff on the excelsior and tow so manufactured and shipped by him, as aforesaid, decreased from One Dollar ($1.00) per ton to Thirty Cents (30c) per ton.

35 And the plaintiff avers that the said defendants on, to-wit, September 1st, 1912, and throughout the period aforesaid, to-wit, from September 1st, 1912, to the date of the filing of this suit, in manner and form as herein alleged, unlawfully conspired to and did restrain trade and commerce among the several states of the United States, contrary to the provisions of the act of Congress aforesaid.

And the plaintiff avers that by reason of the unlawful conspiracy in this count mentioned, the plaintiff has been injured in his property and business in this, that the value of his said plant at St. Paul, Minnesota, has been decreased from to-wit, Sixty Thousand Dollars ($60,000) to Twenty-five Thousand Dollars ($25,000), to the damage of the plaintiff of Thirty-five Thousand Dollars ($35,000); By means whereof, the plaintiff, by reason of the matters and things in this count mentioned, has been damaged in a large sum of money, to-wit, the sum of Thirty-five Thousand Dollars ($35,000).

Wherefor, to recover three-fold such damages in this declaration alleged, and costs of suit, including reasonable attorneys' fees under Section 7 of the aforesaid Act of Congress, plaintiff brings suit.

ALDEN LATHAM YOUNG
Attorneys for Plaintiff.

(Endorsed) Filed Nov. 25—1914, T. C. MacMillan, Clerk.

36 And afterwards, to-wit: the 25th of November, 1914, a
1914. Writ of Summons issued out of the Clerk's office of said Court against said defendants in said above entitled cause, which said writ with the return of the Marshal thereon endorsed is in the words and figures following, to-wit:

37 District Court of the United States of America, } ss.
Northern District of Illinois. }

UNITED STATES OF AMERICA

To the Marshal of the Northern District of Illinois—Greeting:

We Command You to Summon Chicago & Northwestern Railway Co., a corporation, Chicago, Burlington & Quincy Railroad Co., a corporation, Chicago, St. Paul, Minneapolis & Omaha Railway Co., a corporation; Chicago, Milwaukee & St. Paul Railway Co., a corporation; Illinois Central Railroad Co., a corporation; Chicago Great Western Railroad Co., a corporation; Minneapolis, St. Paul & Sault Ste. Marie Railway Co., a corporation; Chicago, Rock Island & Pacific Railway Co., a corporation; Hiram R. McCullough, Oscar Townsend, Henry E. Pierpont, H. M. Pearce, E. B. Boyd, Marvin Hughitt, Jr., W. L. Martin, James E. Gorman, David W. Longstreet; Claude C. Burnham; Edward S. Keeley; Harry Gower; if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term thereof, to be holden at Chicago, in the District aforesaid, on the third Monday of December next, to answer unto John W. Keogh, of a plea of trespass on the case to his damages, as he alleges, of One Hundred and Twenty-five thousand ($125,000.00) Dollars, and have you then and there this Writ.

Witness, The Hon. George A. Carpenter Judge of the District Court of the United States of America, at Chicago aforesaid, this 25th day of November, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 139th year.

T. C. MacMillan,
Clerk.

By John H. R. Jamar,
Deputy Clerk.

(Seal)

(Endorsed) Gen. No. 32034 District Court of the United

States. Northern District of Illinois. J. W. Keogh, vs. C. & N. W. Ry. Co. et al. Summons. Returnable Dec. Term, A. M. 19.... T. C. MacMillan, Clerk. Alden, Latham & Young, Attorney.

38 MARSHAL'S RETURN. Marsha retur

I have served this writ within my district in the following manner, to-wit: upon the Chicago, Burlington & Quincy Railroad Co., a corporation, by delivering a true copy to S. F. Blane, Attorney for and authorized to accept service for the above named corporation.

At Chicago, Illinois, November 28th, 1914.

Upon the Chicago & Northwestern Railway Co., a corporation, and the Chicago, St. Paul, Minneapolis & Omaha Railway Co. a corporation, by delivering two copies to Ira C. Belden, Attorney for and authorized to accept service for the above named corporations.

Upon the Chicago, Milwaukee & St. Paul Railway Co. a corporation, by delivering a copy to L. S. Hill, Clerk for an authorized to accept service for the above named corporation.

Upon the Illinois Central Railroad Co. a corporation, by delivering a copy to B. A. Beck, Secretary for and authorized to accept service for the above named corporation.

Upon the Minneapolis, St. Paul & Sault Ste. Marie Railway Co., a corporation by delivering a copy to F. B. Martin, Agent for and authorized to accept service for the above named corporation.

Upon the Chicago, Rock Island & Pacific Railway Co. a corporation by delivering a copy to W. F. Dickson, Attorney for and authorized to accept service for the above named corporation.

Upon Henry E. Pierpont by delivering to him a copy thereof. All of the above named were served at Chicago, Illinois, December 1st, 1914.

Upon the Chicago, Great Western Railroad Co. a corporation by delivering a copy to Silas H. Straum, attorney for and authorized to accept service for the above named corporation.

Upon Hiram R. McCullough, Marvin Hughitt, Jr., Edward S. Keeley, James E. Gorman, Harry Gower, David W. Longstreet, E. B. Boyd, Oscar Townsend and Claude G. Burnham, all of the above named were served at Chicago, Illinois, De-

cember 2nd, 1914, by delivering to each a copy thereof. H. M. Pearce and W. L. Martin does not live within my district.

JOHN J. BRADLEY,
U. S. Marshal,
By E. R. DAVIS,
Deputy.

Marshal's Fees.

18 services	36.00
18 miles	1.08
	$37.08

(Endorsed) Filed Dec. 3, 1914, T. C. MacMillan, Clerk.

39 And on to-wit: the 4th day of March, 1915, came the defendants C. & N. W. Ry. Co., Hiram R. McCullough & Marvin Hughitt Jr. by their attorneys and filed in the Clerk's office of said Court their certain Plea, in words and figures follows, to-wit:

40 UNITED STATES OF AMERICA, Plea, fi Mar.

Northern District of Illinois

Eastern Division.

In the District Court Thereof.

John Keogh,
Plaintiff,
vs.
Chicago & North Western Railway Company, a corporation, Chicago, Burlington & Quincy Railroad Company, a corporation, Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Chicago, Milwaukee & St. Paul Railway Company, a corporation, Illinois Central Railroad Company, a corporation, Chicago Great Western Railroad Company, a corporation, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, Chicago, Rock Island & Pacific Railway Company, a corporation, Hiram R. McCullough, Claude G. Burnham, Edward S. Keeley, Harry Gower, Marvin Hughitt Jr., Oscar Townsend, Henry E. Pierpont, H. M. Pearce, W. L. Martin James E. Gorman, David W. Longstreet, E. B. Boyd,
Defendants.
S. S. No. 32034

Now come Chicago and North Western Railway Company, Hiram R. McCullough and Marvin Hughitt Jr., defendants above named, by C. C. Wright and C. A. Vilas, their attorneys, and defend the wrong and injury, when, etc., and as to the plaintiff's declarations filed herein, and each and every count thereof, say that they are not guilty of the said supposed grievances therein laid to their charge, or any or either of them, in manner and form as the plaintiff hath therein

1915. complained against them; and of this the said defendants put themselves upon the country, etc.

C. C. WRIGHT & C. A. VILAS,
Attorneys for Hiram R. McCullough, Marvin Hughitt Jr. and C. & N. W. Ry. Co.

(Endorsed) Filed March 4-1915. T. C. MacMillan, Clerk.

41 And on to-wit: the 16th day of April, 1917, came the Chicago & Northwestern Ry. Co. by its attorneys and filed in the Clerk's office of said Court its certain Amended Notice, in words and figures following, to-wit:

42 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Amended notice, Apr. 1

John W. Keogh,
Plaintiff,

vs.

Chicago and North Western Railway Company, a corporation, Chicago, Burlington & Quincy Railroad Company, a corporation, Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Chicago, Milwaukee & St. Paul Railway Company, a corporation, Illinois Central Railroad Company, a corporation, Chicago Great Western Railroad Company, a corporation, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, Chicago, Rock Island & Pacific Railway Company, a corporation, Hiram R. McCullough, Claude G. Burnham, Edward S. Keeley, Harry Gower, Marvin Hughitt, Jr., Oscar Townsend, Henry E. Pierpont, H. M. Pearce, W. L. Martin, James E. Gorman, David W. Longstreet, E. B. Boyd,
Defendants.

No. 32034.

AMENDED NOTICE.

And now comes the Chicago and North Western Railway Company, Marvin Hughitt, Jr., and Hiram R. McCullough, three of the defendants in the above styled cause, by attorneys, and give notice, under the plea of the general issue, that they intend to rely upon the special matters hereinafter set forth for a defense on the trial, and that evidence will be given by them on the trial of the above styled cause to establish the following facts, to-wit:

That defendant, Chicago and North Western Railway Company, at the time the matters and things set forth in the declaration herein took place, was and for a long time prior thereto had been, and still is, a railroad corporation engaged in the business of a common carrier of passengers and property in interstate commerce and therefore subject to the
43 provisions of the Federal Act to Regulate Commerce and to the acts amendatory thereof and supplementary thereto, and therefore subject to and within the jurisdiction of the Interstate Commerce Commission.

That all the tariffs, rates and charges alleged, referred to and complained of in the declaration herein, were tariffs, rates and charges relating to and affecting interstate commerce and therefore subject to the provisions of the Federal Act to Regulate Commerce and to the acts amendatory thereof and supplementary thereto, and therefore subject to and within the jurisdiction of the Interstate Commerce Commission.

That in the months of September, October, November and December, 1912, at various dates in said months, defendant, Chicago and North Western Railway Company, filed certain schedules or tariffs with the Interstate Commerce Commission in the manner and form provided by law and otherwise published and promulgated said schedules or tariffs as provided by law and by the orders of the Interstate Commerce Commission, and concurred in certain tariffs and schedules filed by connecting carriers, establishing rates on excelsior and flax tow from St. Paul, Minnesota, and from other points in the vicinity of St. Paul to Chicago, Illinois, St. Louis, Missouri, Des Moines, Iowa, to certain cities located on the Missouri River and to all other destinations mentioned or in any wise referred to in the said declaration, which tariffs and schedules will be offered in evidence on the trial of this case; the said schedules or tariffs so filed and promulgated and published as aforesaid carried the rates on excelsior and tow which are in the said declaration alleged to be unlawful and unreasonable and which form the basis for plaintiff's demand; that the said plaintiff filed a complaint or protest with the Interstate Commerce Commission protesting against the rates on excelsior and tow carried in said schedules or tariffs and asking that the operation of the said schedules or
44 tariffs be by the Interstate Commerce Commission suspended, pending an investigation by the said Commis-

sion as to the propriety and legality of the said rates; that the said Commission thereupon, by appropriate order, entered upon a hearing concerning the propriety and lawfulness of the said rates and for reasons given in the said order, which will be offered in evidence on the trial of this case, suspended the operation of the said schedules or tariffs until the 12th day of February, 1913; that the said Commission by appropriate supplemental order further suspended the operation of the said schedules or tariffs until June 12, 1913; that a full hearing was had before the said Commission, whereat plaintiff appeared in person and by attorney and gave evidence in support of his protest against the said rates and whereat evidence was offered by certain common carriers, parties to said schedules or tariffs; that the said Commission, after a full hearing as aforesaid and upon due consideration, on April 14th, 1913, promulgated and issued its report and order in said proceeding, known on the docket of the said Commission as Investigation and Suspension Docket Number 170 and Investigation and Suspension Docket Number 182, in which report and order the said rates contained in the schedules or tariffs, applying on the said excelsior and tow from St. Paul, Minnesota, to Chicago, Illinois, were held to be reasonable, non-discriminatory and in all respects lawful, and the rates from St. Paul, Minnesota, to interstate destinations other than Chicago, Illinois, were held to be lawful in so far as they did not represent advances over previously existing rates of more than 3-1/2 cents per hundred pounds, all of which appears in the report and order of the said Commission, which will be offered in evidence on the trial of this case. The report in the said case is found in the published official reports of the Interstate Commerce Commission, as shown in Volume 26 thereof, at pages 689 to 694, inclusive.

Amended notice, Apr. 16

That shortly after the rendition of the said report and
45 order, the plaintiff filed with the Interstate Commerce Commission an application for a rehearing, which application was by the Commission denied by appropriate order, which will be offered in evidence on the trial of this case; thereafter, plaintiff filed a second petition, seeking to have the said case reopened. Upon the filing of this said second petition, the Commission reopened the case for the purpose of considering whether carload rates on the said flax tow and excelsior should be made on a 30,000 pound minimum basis

lower than the rates fixed and approved by the Commission on a 20,000 pound minimum basis. In accordance with the order of the Commission, a hearing was had upon the said second petition so filed by the plaintiff, whereat plaintiff was represented in person and by attorney, and, after due consideration of all the evidence offered, the Commission made and promulgated its order in the premises, dated March 2d, 1914, whereby its previous action in the matter was reaffirmed and in which the Commission refused to prescribe a lower rate than it had heretofore done, conditioned upon the use of a higher minimum weight. This report and order will be offered in evidence on the trial of this case, and the report in the said matter is found in the published official reports of the Commission in Volume 29, Interstate Commerce Commission Reports, pages 640 to 642, inclusive thereof.

These defendants will further offer proof to show that, after the rendition of the said several decisions in this notice heretofore referred to, defendant, Chicago and North Western Railway Company, filed amended and modified schedules or tariffs applying on excelsior and tow from St. Paul, Minnesota, to St. Louis, Missouri, Des Moines, Iowa, to points on the Missouri River and to other destinations named in the declaration, which were in all respects in accordance, as those defendants believed, with the said report and order of the said Interstate Commerce Commission, which said schedules and tariffs were approved and by special permission permitted to be filed by orders of the Commission dated respectively October 6 and October 31, 1913, copies of which orders, together with the tariffs and schedules above referred to, will be offered in evidence on the trial of this case; that after the filing thereof the Interstate Commerce Commission, having received complaints that certain of the rates contained in the said schedules were discriminatory and were not in fact in conformity with the views of the Interstate Commerce Commission as expressed in the said reports, reopened the said case and had an additional and further hearing thereon, at which evidence was offered and received, and at which plaintiff was represented in person and by attorney, and after argument the said Commission, on November 2d, 1915, published and promulgated its report and order in the case heretofore referred to as Investigation and Suspension Docket Number 170 and Investigation and Suspension Docket Number 162, in which it fixed and pre-

scribed rates from St. Paul, Minnesota, to points on the Missouri River and to other points mentioned in the said declaration, which were in most cases the same as those established by the defendant, Chicago and North Western Railway Company. This report and order will be offered in evidence on the trial of this case, the report being found in the published official reports of the Interstate Commerce Commission in Volume 36, at pages 349 to 367, inclusive. Amended notice, Apr. 16

Defendants will offer evidence that, during all the time mentioned in the said declaration, no schedules or tariffs of rates were in effect on excelsior or tow from St. Paul, Minnesota, to the interstate destinations mentioned in the said declaration that had not been expressly approved by the Interstate Commerce Commission, and will show that all of said tariffs and schedules of which the plaintiff in his declaration complains have been found by the said Commission to be reasonable, lawful and non-discriminatory.

That at each and every of the said hearings hereinbefore referred to the plaintiff and all of defendant Railways in
47 this action introduced parol and documentary evidence bearing on the question of the character and value of the service covered by said tariffs, schedules and rates, and the reasonableness of the said rates, and various factors, elements and conditions material to a determination of the reasonableness or unreasonableness of said rates; that the evidence and claims and contentions of the respective parties were fully weighed and considered by the said Interstate Commerce Commission in determining the question of reasonableness of the said rates; and for the purpose of establishing the scope and effect of the reports and decisions of the said Interstate Commerce Commission in said proceedings, and the various matters and things considered by the said Interstate Commerce Commission in arriving at its decisions and determination, and for all other proper purposes, this defendant will introduce in evidence a copy of the entire record in each and all of the said proceedings, including a transcript of all evidence, oral and documentary, received on said hearings, together with copies of all schedules and tariffs involved therein or affected thereby.

That all of the tariffs, rates and charges which this railway defendant in any way made, or enforced, or collected, against or from the plaintiff herein and of which plaintiff complains in the declaration herein, were made by virtue of,

and in accordance with, and pursuant to the order and determination of said Interstate Commerce Commission, acting under and by virtue of the Federal Act to Regulate Commerce and the acts amendatory thereof and supplementary thereto and within its lawful and exclusive jurisdiction.

That said determination and orders of said Interstate Commerce Commission, with reference to such tariffs, rates and charges, had the force and effect of law; that the lawful jurisdiction of said Interstate Commerce Commission in making said determination and orders was exclusive, and its
48 jurisdiction to determine the reasonableness and lawfulness of said tariffs, rates and charges was exclusive, and that its said determination and orders are not subject to review or re-examination in this action.

That defendant had the lawful right to make said tariffs, rates and charges referred to, pursuant to and by virtue of said determination and orders of said Interstate Commerce Commission so made, and its conduct in that respect and while so acting within the said determination and orders of said Interstate Commerce Commission, cannot be reviewed, inquired into, or made the subject or ground of this action.

C. C. WRIGHT,
C. A. VILAS AND
E. M. SMART
Attorneys for Defendants, Chicago and North Western Railway Company, Marvin Hughitt, Jr. and Hiram R. McCullough.

EDWARD M. HYZER,
Of Counsel.

(Endorsed) Filed April 16—1917, T. C. MacMillan, Clerk

49 And afterwards, to-wit: on the 4th day of June, 1919 being one of the days of the regular June, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George L. Page, Circuit Judge, appears the following entry, to-wit:

50 Wednesday, June 4, 1919. Judgment June 4,
Page, J.

John W. Keogh,
vs.
Chicago and Northwestern Railway Company. } 32034

Now come the parties by their respective attorneys and by agreement in open court enter into the following stipulation, to wit:

In the course of the presentation of evidence on behalf of the plaintiff, the court in ruling on the admissibility of evidence, stated that if the facts set forth in the amended notices of special matters to be offered in behalf of the defendants under the general issue could be proved, it was his opinion that such facts would constitute an absolute defence to this case;

Thereupon it was stipulated and agreed in open court by and between the parties, that the evidence heretofore taken should be withdrawn, and the jury discharged from further consideration of this cause; that the special matter set forth in the amended notices be considered as having been well pleaded in one or more special pleas to the amended declaration for each and all defendants, in addition to the pleas of the general issue on file, and that the four reports and orders of the Interstate Commerce Commission in the flax tow and excelsior cases referred to in said amended notices, together with the report and order of the Interstate Commerce Commission in the so-called Dubuque case, 30, I. C. C. Reports, 443, be considered as having been set forth and incorporated verbatim in said special pleas; that it be considered that a general demurrer to each of said special pleas has been interposed on behalf of the plaintiff, on the ground that the facts alleged in said special pleas do not constitute a defence at law.

And the court, after hearing arguments of counsel upon the general demurrer and each and every of said special pleas and having considered the same and being fully advised in the premises, overruled and denies the same. Thereupon the plaintiff elects to stand by said demurrers.

It is therefore considered and adjudged by the Court that the plaintiff take nothing by his said declaration and that

f 1919. the defendant have and recover its costs herein to be taxe for which let execution issue, to which plaintiff excepts.

It is further ordered by the Court that the bond on wri of error be fixed at the sum of Two hundred and fift dollars.

51 And on to-wit: the 9th day of October, 1919, came th plaintiff herein by his attorneys and filed in the Clerk' ed 1919. office of said Court his certain Petition for Writ of Erro in words and figures following, to-wit:

52 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

John W. Keogh, *Plaintiff*,
vs.
Chicago & Northwestern Railway Company, *et al.*
} Gen. No. 32034

To The Honorable George T. Page, Judge of Said Court:

Now comes John W. Keogh, plaintiff, by Alden, Latham Young, his attorneys, and feeling himself aggrieved by th final judgment of the court, entered on the 4th day of Jun 1919, hereby prays that a writ of error may be allowed t him from said judgment to the United States Circuit Cou of Appeals for the Seventh Circuit, and that citation issu as provided by law, and he presents herewith his assignmen of errors.

ALDEN LATHAM & YOUNG
Attorneys for John W. Keogh, Plaintif

(Endorsed) Filed Oct. 9—1919, John H. R. Jamar, Cler

53 And on to-wit: the 9th day of October, 1919, come th plaintiff herein by his attorneys and filed in the Clerk' office of said Court his certain Assignment of Errors, i words and figures following, to-wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

Assignmen errors, f Oct. 9, 1

For the Northern District of Illinois

Eastern Division

John W. Keogh, *Plaintiff*,
vs.
Chicago & Northwestern Railway Company, *et al.*, *Defendants.* } No. 32034

ASSIGNMENT OF ERRORS OF JOHN W. KEOGH, PLAINTIFF.

Now comes John W. Keogh, plaintiff, by Alden, Latham & Young, his attorneys, and in connection with his petition for a writ of error says, that in the record and proceedings and in the final judgment entered in the above entitled cause on June 4, 1919, manifest error has intervened to his prejudice, as follows:

1st: That the court erred in holding that the special matters set up in the amended notices filed by the defendants constituted a defense to the suit.

2nd: That the court erred in holding that the special matters set up in the special pleas filed by the defendants constituted a defense to the suit.

3rd: That the court erred in overruling the demurrers of the plaintiff, to each of the special pleas of the defendants.

4th: That the court erred in entering judgment against the plaintiff and in favor of the defendants for costs.

55 Wherefore the plaintiff, John W. Keogh, prays that the said judgment be reversed, and that the District Court be directed to sustain the demurrers of the plaintiff to the special pleas of the defendants.

ALDEN LATHAM & YOUNG,
Attorneys for John W. Keogh,
Plaintiff.

(Endorsed) Filed Oct. 9—1919, John H. R. Jamar, Clerk.

rit filed 919.

59 And on to-wit: the 9th day of October, 1919, come John W. Keogh, as principal and Fidelity & Casualty Co. of New York, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Writ of Error in words and figures following, to-wit:

60 Know All Men by these Presents, That we, John W. Keogh, of Chicago, Cook County, Illinois, and The Fidelity and Casualty Company of New York, as surety, are held and firmly bound unto Chicago & Northwestern Ry. Co., Chicago, Burlington & Quincy R. R. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Illinois Central R. R. Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. Chicago, Rock Island & Pacific Ry. Co., Hiram R. McCullough Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend Edward S. Keeley, Henry E. Pierpont, James E. Gorman Harry Gower, David Longstreet and E. R. Boyd, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Chicago & Northwestern Railway Co., et al their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 9th day of October, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between John W. Keogh, plaintiff, and the said Chicago & Northwestern Railway Co., et al, defendants a judgment was rendered against the said John W. Keogh, and the said John W. Keogh, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Chicago & Northwestern Railway Co., et al, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said John W. Keogh shall prosecute his writ to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above

obligation to be void; otherwise to retain in full force and virtue. Bond on writ of error Oct. 9.

Sealed and delivered in presence of—
CHARLES MARTIN

JOHN W. KEOGH (Seal)
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK (Seal.
By ALBERT C. KORTE. (Seal)

Approved by—
GEO. T. PAGE,
Judge.

(Endorsed) Filed Oct. 9, 1919, John H. R. Jamar, Clerk.

56 And, to wit: the 9th day of October, 1919, being one of the days of the regular term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George T. Page, Circuit Judge, appears the following entry, to-wit: Order of Oct. 9.

57 John W. Keogh,
vs.
Chicago & Northwestern Railway Company, *et al.* } 32034

Now comes the plaintiff herein and this day presents to the Court his Petition for Writ of Error and Assignment of Errors and moves the Court for the allowance of a Writ of Error to the United States Circuit Court of Appeals from the Judgment, heretofore entered herein.

It is ordered by the Court that said Writ of Error be and the same hereby is allowed to the United States Circuit Court of Appeals upon said plaintiff filing a bond in the sum of Two Hundred and Fifty Dollars ($250.00),

Thereupon said plaintiff this day presents bond in the sum of Two Hundred and fifty dollars to the Court for approval. It is ordered by the Court that said bond be and the same hereby is approved.

58 United States of America, } ss.

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between John W. Keogh plaintiff, and the Chicago & Northwestern Ry. Co., Chicago Burlington & Quincy R. R. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Illinois Central R. R. Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Chicago Rock Island & Pacific Ry. Co., Hiram R. McCullogh, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend, Edward S. Keeley, Henry E. Pierpont, James E. Gorman, Harry Gower, David Longstreet and E. R. Boyd, defendants, a manifest error hath happened, to the great damage of the said John W. Keogh as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 9th day of October in the year of our Lord one thousand nine hundred and nineteen.

JOHN H. R. JAMAR
Clerk of the District Court of the United States for the Northern Dist. of Illinois

Allowed by
GEORGE I. PAGE,
Judge.

Northern District of Illinois, } ss.

Return to writ of

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of November A. D. 1919.

JOHN H. R. JAMAR
(Seal) *Clerk United States District Court,*
Northern District of Illinois.

61 And on to-wit: the 6th day of November, 1919, there was filed in the Clerk's office of said Court a certain Stipulation, in words and figures following, to-wit:

Stipulation filed Nov. 1919.

62 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

John W. Keogh, *Plaintiff,*
vs.
Chicago & Northwestern Railway Company, *et al*, *Defendants.* } Gen. No. 32034.

It Is Hereby Stipulated by and between the parties hereto, by their respective attorneys, that all the defendants who were served or appeared in said cause have filed pleas of the general issue, together with amended notices of special matters to be offered in evidence under the said pleas of general issue, and that all of said pleas and amended notices filed by said defendants are the same in form and substance, and for the purpose of shortening the record to be sent to the court of appeals, it is agreed by the parties hereto that the clerk of the court, in preparing the transcript of record in said cause, shall insert therein the plea and the amended notice of special matters filed by the defendant, Chicago & Northwestern Railway Company, and said plea and amended notice of special

6. matters shall be considered as applying to all the defendants as fully as though all the pleas and special notices filed by all the defendants had been fully set forth in the transcript of the record.

ALDEN, LATHAM & YOUNG,
Attys for Plaintiff.
E. M. SMART, and NELSON J. WILCOX,
Attys. for C. & N. W. Ry. Co., Hiram R. McCullough and Marvin Hughitt, Jr.
R. B. SCOTT, and J. C. JAMES,
Atty. for C. B. & Q. R. R. Co. and Claude G. Burnham and E. R. Boyd.

63 E. M. SMART and NELSON J. WILCOX,
Attys. for C. St. P., Minn. & Omaha Ry. Co.
O. W. DYNES, & CARL S. JEFFERSON,
Attys. for C. M. & St. P. Ry. Co., Edward S. Keeley and Henry E. Pierpont.

Attys. for I. C. R. R. Co., D. W. Longstreet and E. R. Boyd.
WINSTON, STRAWN & SHAW,
Attys. for C. Gt. Western R. R. Co. and Oscar Townsend.
VROMAN, MUNRO & VROMAN,
Attys. for Minn. St. P. & S. Ste. Marie Ry. Co.
M. L. BELL, W. F. DICKINSON and
A. B. ENOCH,
Attys. for C. R. I. & P. Ry. Co., James E. Gorman and Harry Gower.

(Endorsed) Filed Nov. 6, 1919, John H. R. Jamar, Clerk

64 And on to-wit: the 6th day of November, 1919, there was filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to-wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

Stipulation filed Nov. 1918.

John W. Keogh, *Plaintiff,*
vs.
Chicago & Northwestern Railroad Company, *et al, Defendants.* } No. 32034.

It Is Hereby Stipulated by and between the plaintiff and the defendants, Illinois Central Railroad Company and D. W. Longstreet, by their respective attorneys, that said defendants filed a plea of general issue and an amended notice of special matters to be offered in evidence under the plea of general issue, and that the said plea is the same in substance and in form as the plea of the defendant, Chicago & Northwestern Railroad Company, and that the said amended notice is the same in form and substance as the amended notice filed by the defendant, Chicago & Northwestern Railroad Company, except that the notice filed by these defendants contained the following additional provision:

"These defendants will show further by the said reports of the Interstate Commerce Commission that the said Commission, which is the sole body having authority to pass upon such questions, has expressly held that rates other than those filed and promulgated by the defendant, Illinois Central Railroad Company, and of which the plaintiff in his said declaration complains, would be discriminatory and unlawful, and, if made lower than those in the said declaration complained of, would unduly burden other traffic and would operate to the injury of other communities and would be unlawful, discriminatory and unreasonable."

It Is Further Agreed, for the purpose of shortening the record, that the said plea and amended notice of the Chi-
66 cago & Northwestern Railroad Company, which are inserted in the transcript of the record by stipulation of the plaintiff and the other defendants herein, shall be considered as applying to these defendants, together with the additional provision above set forth as fully as though the plea and

amended notice filed by these defendants were fully set forth in the transcript of record.

ALDEN, LATHAM & YOUNG
Attorneys for Plaintiff.

R. V. FLETCHER
Attorneys for Defendants, Illinois Central Railroad Company and D. W. Longstreet.

(Endorsed) Filed Nov. 6, 1919, John H. R. Jamar, Clerk.

67 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

John W. Keogh, *Plaintiff,*
vs.
Chicago & Northwestern Railway Company, *et al, Defendants.*
} Gen. No. 32034.

PRAECIPE

To—John H. R. Jamar, Esq., Clerk of the District Court of United States, for the Northern District of Illinois:

The Clerk will please prepare a transcript of record of the above entitled cause for filing in the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and incorporate therein the following:

Declaration filed November 25, 1914.

Summons dated November 25, 1914, and return of marshal showing service on all defendants.

Plea of the defendant, Chicago & Northwestern Ry. Co. filed March 4, 1915.

Amended notice of special matters filed by the defendant Chicago & Northwestern Ry. Co., on April 16, 1917.

Judgment entered on June 4, 1919.

Petition for writ of error filed October 9, 1919.

Assignment of errors filed October 9, 1919.

Order allowing writ of error entered October 9, 1919.

Writ of error issued October 9, 1919.

68 Bond of John W. Keogh on writ of error filed October 9, 1919. Praecipe transcript record, Nov. 6,

Citation issued October 9, 1919, and acceptances of service hereof.

Stipulations relating to the transcript of record filed November 6, 1919.

Praecipe for record filed November 6, 1919.

ALDEN, LATHAM & YOUNG
Attorneys for John W. Keogh, Plaintiff.

We Hereby Acknowledge Receipt of a copy of the above praecipe this 24th day of October, A. D. 1919.

R. B. SCOTT & J. C. JAMES
Attys. for C. B. & Q. R. R. Co.
E. M. SMART & NELSON J. WILCOX
For C. & N. W. Ry. Co. & C. St. P. & M. & O. Ry. Co.
WINSTON, STRAWN & SHAW
Attys. for C. G. W. R. R. Co. & Oscar Townsend
R. V. FLETCHER by E. A. SMITH
Attys for I. C. R. R. Co. & D. W. Longstreet
W. F. DICKINSON and A. B. ENOCH
For C. R. I. & P. R. R. Co.
O. W. DYNES & CARL S. JEFFERSON
Attys. for C. M. & St. P. Ry. Co. and E. S. Keeley & H. E. Pierpont
FAYETTE S. MUNRO
Atty. for M. St. P. & S. Ste. Marie R. R.
Attorneys for Defendants.

(Endorsed) Filed November 6, 1919, John H. R. Jamar, Clerk.

of 69 Northern District of Illinois } ss
Eastern Division, }

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled John W. Keogh, Plaintiff, vs Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, St Paul, Minneapolis and Omaha Railroad Company, Chicago, Great Western Railroad Company, Minneapolis, St. Paul & Saulte Ste. Marie Railway Company, Chicago, Rock Island & Pacific Railway Company, Hiram R. McCullough, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend, Edward S. Kelley, Henry R. Pierpont, James E. Gorman, Harry Gower, David Longstreet, and E. R. Boyd, Defendants, No. 32034, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 7th day of November, A. D. 1919.

JOHN H. R. JAMAR
Clerk

(Seal)

, filed
31, 1919. 70 United States } ss
of America, }

The President of the United States, To Chicago & Northwestern Ry. Co., Chicago, Burlington & Quincy R. R. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Illinois Central R. R. Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Saul Ste. Marie Ry. Co., Chicago, Rock Island & Pacific Ry. Co., Hiram R. McCullough, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend, Edward S. Keeley, Henry R. Pierpont, James E. Gorman, Harry Gower, David Longstreet and E. R. Boyd: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk

Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein John W. Keogh is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said John W. Keogh as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. Citation, Oct. 31,

Witness the Honorable George T. Page, Judge of the District Court of the United States, this 9th day of October, in the year of our Lord one thousand nine hundred and nineteen.

GEO. T. PAGE
Judge.

We Hereby Accept Service of the above citation.
Oct. 24, 1919.

E. M. SMART & NELSON J. WILCOX
Attys. for C. & N. W. Ry. Co., Hiram R. McCullough and Marvin Hughitt, Jr.
E. M. SMART & NELSON J. WILCOX
Attys. for C. St. P. Minn. & Omaha Ry. Co.
R. V. FLETCHER by E. A. SMITH
Attys. for I. C. R. R. Co., D. W. Longstreet and E. R. Boyd
FAYETTE S. MUNRO
Attys. for Minn. St. P. & S. Ste. Marie Ry. Co.
R. B. SCOTT & J. C. JAMES
Attys. for C. B. & Q. R. R. Co. and Claude G. Burnham.
O. W. DYNES & CARL S. JEFFERSON
Attys. for C. M. & St. P. Ry. Co. Edward S. Keeley and Henry E. Pierpont
WINSTON, STRAWN & SHAW
Attys. for C. Gt. Western R. R. Co. and Oscar Townsend.
W. F. DICKINSON and A. B. ENOCH
Attys. for C. R. I. & P. Ry. Co., James E. Gorman and Harry Gower.

October 27, 1919.

(Endorsed) Filed Oct. 31, 1919, John H. R. Jamar, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Cou of Appeals for the Seventh Circuit, do hereby certify that the fore going printed pages, numbered from 1 to 53, inclusive, contain a tru copy of the printed record, printed under my supervision, and file December 18, 1919, on which this cause was heard and determine in the case of John W. Keogh vs. Chicago & Northwestern Railwa Company, Chicago, Burlington & Quincy Railroad Company, et al No. 2776, October Term, 1919, as the same remains upon the file and records of the United States Circuit Court of Appeals, for th Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affi the seal of said United States Circuit Court of Appeals for th Seventh Circuit, at the City of Chicago, this twenty-second day March, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals fo the Seventh Circuit begun and held in the United States Cour room, in the city of Chicago, in said Seventh Circuit, on the fift day of October, 1920, of the October term, in the year of ou Lord one thousand nine hundred and twenty, and of our Inde pendence the one hundred and forty-fifth.

And afterwards, to-wit: On the fourth day of January, 1921, i the October term aforesaid, there was filed in the office of the Cle of this Court the Opinion of the Court, which Opinion is in the word and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, 1920.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al., Defendants in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker and Alschuler, Circuit Judges, and FitzHenry, District Judge.

This writ of error was sued out by plaintiff to reverse the judgment in favor of the defendant in the District Court. He brought his action to recover three-fold damages under the provisions of the Sherman Anti-Trust Act. The declaration alleges in substance that on September 1st, 1912, and for several years prior, plaintiff was engaged in the business of manufacturing and selling excelsior and tow, with his principal office and place of business in Chicago; from 1909 to the date of the commencement of this suit he owned and operated a mill at St. Paul, Minnesota, where he manufactured his products and shipped them to various consignees in interstate trade and commerce within the meaning of the Act of Congress of July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." The defendant corporations, during the same time, were common carriers, engaged in interstate commerce from St. Paul to various points. The individual defendants are the officers, agents and employees of the defendant corporations. It is charged that after September 1, 1912, plaintiff paid large sums of money to the various carriers for transporting his products from St. Paul; that the defendant corporations, at their expense, maintained an association known as "The Western Trunk Line Committee"; that the members of the association were competing carriers in interstate commerce and the object of the association is to agree upon, fix, maintain and publish uniform, arbitrary and non-competitive freight rates to competing points; that one of the rules of the association requires the unanimous vote of all members to fix or change a freight rate and all members must abide by the decision of the association and maintain the freight rates so fixed. Any member failing to maintain the rates, so fixed, shall be expelled or suffer other penalties; that the committee met from time to time in Chicago and agreed upon, fixed, maintained and published freight rates to various points in several states, and the rates so fixed were arbitrary, uniform, unreasonable and non-competitive and not based

on what would be a fair remunerative rate to the carriers transporting such freight; and that it maintained and published such rates in violation of the Anti-Trust Act of Congress; that thereby all competition for the transportation of excelsior and tow from St. Paul was destroyed and the rates agreed upon maintained; that defendants during the period unlawfully conspired to and did restrain trade and commerce among several states, contrary to the statute; and by reason of the conspiracy plaintiff had been injured in his business and property, in that the freight rates which defendants collected for the transportation of excelsior and tow from the plaintiff were greatly increased over the freight rates which would have been charged and collected if no such conspiracy had been entered into, setting forth a detailed statement of shipments made by the plaintiff from St. Paul to various points between September 1, 1912, and the date of the commencement of this suit; that the defendant corporations embraced all the common carriers running out of St. Paul, and it was necessary for him to patronize all or some of the defendants; that the consequence of the conspiracy was that plaintiff's profits during the time in question were reduced to the extent of the difference between the rate that would have existed had it not been for the conspiracy and the rates collected as a result thereof.

The second count charges that from September 1, 1912, the defendants carried on their business in accordance with the plans adopted by The Western Trunk Line Committee and all competition as to rates for the transportation of excelsior and tow from St. Paul which had theretofore existed was prevented and destroyed by the fixing of the rates which were greatly in excess of the freight rates which but for the conspiracy would have prevailed. That in 1909 and 1910 plaintiff built a tow and excelsior mill at St. Paul at great expense and prior to September 1, 1912, he had shipped 9,000 tons of his products per year, and that his net profit on Chicago shipments was $1 per ton; that after that date, defendants increased freight rates on his products from St. Paul to Chicago and other points; that the rates were not competitive and were the result of the combination and conspiracy, and all competition on the freight rates was destroyed. By reason of the alleged unlawful rates and in consequence of the conspiracy, the net profits of the plaintiff on excelsior and tow manufactured by him, decreased from $1 per ton to 30c. per ton; that the contract and combination was in restraint of trade and commerce, contrary to the provisions of the statute.

Defendants filed separate pleas of the general issue and notices of special matters to be shown in defense. The special matters set up in the notices were in substance that the rates complained of in the declaration were those that were subject to the jurisdiction of the Interstate Commerce Commission; that in the months of September, October, November and December, 1912, the defendants filed schedules or tariffs with the Interstate Commerce Commission, which were published as required by law, and carried the rates on excelsior and tow mentioned in the declaration; that the plaintiff had filed his complaint with the Interstate Commerce Commission, which, upon a hearing, held that the rates from St. Paul to Chicago were reason-

able and that the rates from St. Paul to interstate destinations other than Chicago were lawful in so far as they did not represent advances over previous interstate rates of more than 3½c. per 100 pounds. Plaintiff filed his application for a rehearing, which was denied; later, he filed a second petition to have the case reopened, for the purpose of considering whether carload rates on a 30,000 lb. minimum basis on plaintiff's products should be made lower than rates fixed by the Commission upon a 20,000 lb. minimum basis. Upon a hearing, the rates as fixed upon the prior hearing, were permitted to stand by the Commission. Afterwards, defendants filed amended and modified schedules, applying to these products, from St. Paul to St. Louis, Missouri, Des Moines, Iowa, and other destinations, which were in accordance with the findings and report of the Commission. All the tariffs and schedules of which the plaintiff complains have been found by the Commission to be reasonable and lawful.

In the progress of the trial in the court below, the Court intimated that in its judgment the special matters referred to in the notices, if proved, would be a bar to the action. By agreement, the jury was discharged, the special matters set forth in the amended notices were considered as having been well pleaded in one or more special pleas to the declaration, and the reports and orders of the Interstate Commerce Commission in the tow and excelsior cases should be considered as having been set forth and incorporated in the special pleas; that a general demurrer to each of said special pleas be interposed on the ground that the facts alleged in the said special pleas do not constitute a defense at law. The Court thereupon overruled the demurrers. Plaintiff elected to stand by his demurrers, the suit was dismissed and judgment rendered against the plaintiff for costs.

Fitz Henry, *District Judge*, delivered the opinion of the Court.

Plaintiff in error seeks to set aside the judgment of the District Court against him in his action for damages against the defendants under Section 7 of the Sherman Anti-Trust Act, upon the ground that the trial court erred in holding the fact that the freight rates charged and collected by the defendants had been found to be reasonable by the Interstate Commerce Commission was a defense to the action, and overruled plaintiff's demurrers to the defendants' pleas setting out the proceedings had before the Commission.

If the plaintiff had a remedy in the premises it was by virtue of Sec. 7, supra, which provides:

"Any person *who shall be injured in his business or property* by any other person or corporation by reason of anything forbidden or declared by this act may sue therefor * * * and shall recover three-fold the damages *by him sustained* * * *." (Italics ours.)

Under this statute those who may sue for three-fold damages by virtue of its terms are limited to those "who shall be injured in his business or property," and if a recovery is permitted it must be limited to the damages "by him sustained." Pennsylvania Ry. Co.

v. International Coal Co. 230 U. S. 184. The mere fact that the defendants might have been subject to a criminal prosecution by the Government, or to corrective or coersive proceedings at the instance of the Interstate Commerce Commission is of no avail to a litigant unless it is established that he sustained pecuniary damage. Pennsylvania Ry. Co. v. International Coal Co. supra; Knudsen v. Michigan Central R. R. Co. 148 Fed. 968; Meeker v. Lehigh Valley R. R. 183 Fed. 548; Central Coal & Coke Co. v. Hartman, 111 Fed. 96; Motion Picture Patents Co. v. E. Clair Film Co. 208 Fed. 426; Imperial Film Co. v. General Film Co. 244 Fed. 985.

To recover under this statute plaintiff must show, as a result of the defendants' acts, actual damages were sustained. These damages must be proved by facts from which their existence is logically and legally inferable, not by conjecture nor estimates. American Seagreen Slate Co. v. O'Halloran, 229 Fed. 77; Central Coal & Coke Co. v. Hartman, 111 Fed. 96.

Plaintiff in the first count of his declaration very clearly limits his damages due to the alleged conspiracy or combination in restraint of trade to the difference between the rates that were charged by reason thereof and what the rates might have been had the alleged conspiracy not intervened, but described in the second count as having had the effect of reducing plaintiff's profits on his products from $1 to 30c. per ton. No other element of damage is suggested by the pleadings. The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission.

A similar question was before this Court in National Pole Co. v. Chicago & North Western Ry. Co. 211 Fed. 65. In that case, upon the authority of Texas Pacific Ry. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, we held that the question of the reasonableness of a freight tariff was one which was addressed originally and exclusively under the Act to Regulate Commerce to the Interstate Commerce Commission; that this must necessarily be true from the nature of the enterprise involved. The fixing of a just rate for a common carrier for the transportation of persons and property in interstate commerce involves the exercise of a legislative discretion. In the National Pole Co. case, supra, this Court said:

"Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the Commission and have named the rate therefor in a statute. But, with the increasing complexities of human activities, it was impossible to cover the details of rate-making (and the same is true of many other subjects) by specific statutes; and so the board or commission form of legislation is used. That is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. * * * But since the congressional prohibition of unjust rates cannot, by the terms of the act, be effective

against a particular published rate, although unjust, until the Commission has investigated the service in question and has established the standard of justness for all shippers who use that service, the action of the Commission in the regulation of rates is quasi legislative—it converts the actual legislation from a static into a dynamic condition."

And this view has found lodgment in numerous expressions of the Supreme Court upon this same proposition many times since.

When plaintiff first felt aggrieved he sought his relief by the proper procedure—by filing his complaint with the Interstate Commerce Commission. Skinner & Eddy Corporation v. United States, 249 U. S. 557; and cases cited. And the finding of the Commission upon this subject was conclusive. Skinner & Eddy Corporation v. United States, supra.

Had the schedules filed in 1912 been found by the Commission to carry unreasonable and oppressive rates in violation of law, and the amount of damages sustained by reason of defendants charging and collecting the rates provided in the schedules, a different case would be presented. In such case a judicial question would be involved which might be adjudicated in a court as well as before the Commission; but inasmuch as the Commission took the contrary view, holding that the rates provided in the schedules and charged by the defendants and collected from the plaintiff for the shipments complained of were reasonable, a different situation arises.

Congress in the passage of the Act to Regulate Commerce having provided the rules of law applicable to freight charges, and, the administrative board,—Interstate Commerce Commission—having determined the rates fixed by the schedules complained of were within the statute, the plaintiff has no other alternative than to regard the rates as reasonable and as having been well established. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452; Proctor & Gamble v. United States, 225 U. S. 282; Kansas City Southern Ry. Co. v. United States, 231 U. S. 423; Interstate Commerce Commission v. Atchison, Topeka & Santa Fe R. R. Co., 234 U. S. 294.

The rates in defendants' tariff schedules complained of in plaintiff's declaration having been found, by the Interstate Commerce Commission, to be reasonable, are to be treated as though they were embodied in a statute, binding as such upon both defendants and plaintiff alike. Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184-196.

The only element of damage alleged in plaintiff's declaration being predicated upon the payment of freight rates which the plaintiff was required by law to pay and the defendants were required by law to collect, it is apparent that the special matters set out in the several pleas did present a complete defense to the action. It was therefore unnecessary to adjudicate the question as to whether or not the defendants were guilty of the crime of conspiracy under the Anti-Trust Law. If no provable damages were sustained by the plaintiff, there

can be no recovery. The demurrers were properly overruled and the judgment of the District Court will accordingly be

Affirmed.

A true Copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to-wit: On the fourth day of January, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 4, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Louis Fitz Henry, Circuit Judge.

2776.

JOHN W. KEOGH

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO GREAT WESTERN RAILROAD COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, HIRAM R. MCCULLOUGH, MARVIN HUGHITT, JR., CLAUDE G. BURNHAM, OSCAR TOWNSEND, EDWARD S. KEELEY, HENRY E. PIERPOINT, JAMES E. GORMAN, HARRY GOWER, DAVID LONGSTREET, AND E. R. BOYD.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the fourteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Writ of Error, which said Petition for Writ of Error is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al., Defendants in Error.

To the Honorable Judges of said court:

Now comes John W. Keogh, plaintiff in error, by Alden, Latham & Young, his attorneys, and, feeling himself aggrieved by the final judgment of the court entered on the 4th day of January, 1921, hereby prays that a writ of error may be allowed to him from said judgment to the Supreme Court of the United States and that citation issue as provided by law, and that a transcript of the record and proceedings upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and he presents herewith his assignment of errors.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,
Attorneys for John W. Keogh,
Plaintiff in Error.

Endorsed: Filed Mar. 14, 1921. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the fourteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al., Defendants in Error.

Assignment of Errors of John W. Keogh, Plaintiff in Error.

Now comes John W. Keogh, by Alden, Latham & Young, his attorneys, and, in connection with his petition for a writ of error, says that in the record and proceeding and in the final judgment entered in the above entitled cause on January 4, 1921, manifest error has intervened to his prejudice, as follows:

First. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the special matters set up in the special pleas or amended notices filed by the defendants below constituted a defense to the suit.

Second. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the finding of the Interstate Commerce Commission that the rates complained of were reasonable constituted a bar to plaintiff in error recovering damages under the provisions of the Sherman Anti-Trust Act.

Third. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court overruling the demurrer of plaintiff to the special pleas of the defendants.

Wherefore the plaintiff in error prays that the said judgment of the Circuit Court of Appeals be reversed and that the cause be remanded to the District Court with instructions to sustain the demurrers of the plaintiff to the special pleas of the defendants.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,
Attorneys for John W. Keogh,
Plaintiff in Error.

Endorsed: Filed Mar. 14, 1921. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the fourteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Prayer for Reversal, which said Prayer for Reversal is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al., Defendants in Error.

Now comes John W. Keogh, plaintiff in error, and prays for a reversal of the judgment of the District Court of the United States for the Northern District of Illinois in the action brought by John W. Keogh, plaintiff, against Chicago & Northwestern Railway Company and others, defendants, which judgment was entered on June 4, 1919, and he also prays for a reversal of the order of affirmance in said action by the United States Circuit Court of Appeals for the Seventh Circuit entered on January 4, 1921.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,
Attorneys for John W. Keogh,
Plaintiff in Error.

Endorsed: Filed Mar. 14, 1921. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the fourteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond on Writ of Error, which said Bond is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al., Defendants in Error.

Know all men by these presents, That We, John W. Keogh, of Chicago, Illinois, as principal, and The Fidelity and Casualty Company, of New York, as surety, are held and firmly bound unto the defendants, Chicago & Northwestern Ry. Co., Chicago, Burlington & Quincy R. R. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Illinois Central R. R. Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Chicago, Rock Island & Pacific Ry. Co., Hiram R. McCullogh, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Town-

send, Edward S. Keeley, Henry E. Pierpont, James E. Gorman, Harry Gower, David Longstreet and E. R. Boyd, in the full and just sum of Two Hundred and Fifty dollars to be paid to the said defendants, Chicago & Northwestern Ry. Co. et al., certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 14th day of March, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Seventh Circuit, in a suit depending in said Court, between John W. Keogh, Plaintiff in Error, and the said Chicago & Northwestern Railway Co. et al., defendants, a judgment was rendered against the said John W. Keogh, affirming the judgment of the District Court for the Northern District of Illinois, and the said John W. Keogh, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Chicago & Northwestern Railway Co. et al., be and appear at the Supreme Court of the United States to be holden at Washington on the 14th day of April, 1921.

Now, the condition of the above obligation is such, that if the said John W. Keogh shall prosecute his writ to effect, and answer all damages and costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void: otherwise to remain in full force and virtue.

JOHN W. KEOGH. [SEAL.]
THE FIDELITY CASUALTY CO.
OF N. Y. [SEAL.]
By ALBERT C. KOCH. [SEAL.]

Sealed and delivered in presence of

L. G. THORNESS.

Approved by

SAMUEL ALSCHULER, *Judge.*

Endorsed: Filed Mar. 14, 1921. Edward M. Holloway, clerk.

And afterwards, on the same day, to-wit: On the fourteenth day of March, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Monday, March 14, 1921.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Samuel Alschuler, Circuit Judge.

2776.

JOHN W. KEOGH

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now comes John W. Keogh, plaintiff in error herein, and this day presents to the court his petition for writ of error and assignment of errors and prayer for reversal, and moves the court for the allowance of a writ of error to the Supreme Court of the United States from the judgment heretofore entered herein.

It is ordered by the Court that said writ of error be and the same hereby is allowed to the Supreme Court of the United States upon said plaintiff in error filing his bond in the sum of Two Hundred Fifty Dollars ($250.).

Thereupon said plaintiff in error this day presents bond in the sum of $250. to the court for approval. It is thereupon ordered by the court that said bond be and the same is hereby approved.

And afterwards, to-wit: On the eighteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Præcipe for Record, which said Præcipe is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2776.

JOHN W. KEOGH, Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY et al., Defendants in Error.

Præcipe.

To the Clerk of the United States
Circuit Court of Appeals
For the Seventh Circuit:

The Clerk will please prepare a transcript of record of the above entitled cause for filing in the Supreme Court of the United States, and incorporate therein the following:

Transcript of record of the District Court, filed herein November 7, 1919.

Judgment of affirmance and opinion of the Court of Appeals, filed January 4, 1921.

Petition for writ of error, filed March 14, 1921.

Assignment of errors, filed March 14, 1921.

Prayer for reversal, March 14, 1921.

Bond on error, March 14, 1921.

Order allowing writ filed March 14, 1921.

Citation issued March 14, 1921.

Præcipe for record.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,
Attorneys for Plaintiff in Error.

We hereby acknowledge receipt of a copy of the above præcipe this 15th day of March, 1921:

NELSON J. WILCOX,
ROBERT H. WIDDICOMB,
Attys. for C. & N. W. Ry. Co.,
Hiram H. McCullough and Marvin Highitt, Jr.
W. S. HORTON,
R. V. FLETCHER,
Attys. for I. C. R. R. Co.,
D. W. Longstreet and E. R. Boyd.
NELSON J. WILCOX,
ROBERT H. WIDDICOMB,
Attys. for C., St. P., Minn. & Omaha Ry. Co.
JOHN L. McINERNEY,
Atty. for Minn., St. P. & S. Ste. Marie Ry. Co.

BRUCE SCOTT,
J. JAMES,
KENNETH F. BURGESS,
Attys. for C., B. & Q. R. R. Co. and Claude G. Burnham.
CARL S. JEFFERSON,
O. W. DYNES,
Attys. for C., M. & St. P. Ry. Co., Edward S. Keeley and Henry E. Pierpont.
WALTER H. JACOBS,
RALPH M. SHAW,
Attys. for C., Gt. Western R. R. Co., and Oscar Townsend.
W. F. DICKINSON,
A. B. ENOCH.
Attys. for C., R. I. & P. Ry. Co., James E. Gorman and Harry Gower.

Endorsed: Filed Mar. 18, 1921. Edward M. Holloway, clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 18, inclusive, contain a true copy of the proceedings had and papers filed, as called for in the Præcipe for transcript, filed herein on March 18, 1921, in the case of John W. Keogh vs. Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company, et al., No. 2776, October Term, 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of March A. D. 1921.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Filed Mar. 14, 1921. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Ap-

peals before you, or some of you, between John W. Keogh, plaintiff in error, and Chicago & Northwestern Railway Co., Chicago Burlington & Quincy Railroad Co., Chicago, St. Paul, Minneapolis & Omaha Railway Co., Chicago, Milwaukee & St. Paul Railway Co., Illinois Central Railroad Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Chicago, Rock Island & Pacific Railway Co., Hiram R. McCullogh, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend, Edward S. Keeley, Henry E. Pierpont, James E. Gorman, Harry Gower, David Longstreet and E. R. Boyd, a manifest error hath happened, to the great damage of the said John W. Keogh as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by
SAMUEL ALSCHULER,
Circuit Judge.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this twenty-second day of March, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to Hiram R. McCullogh, Marvin Hughitt, Jr., Claude G. Burnham, Oscar Townsend, Edward S. Keeley, Henry E. Pierpont, James E. Gorman, Harry Gower, David Longstreet, E. R. Boyd, Chicago & Northwestern Ry. Co., Chicago, Burlington & Quincy R. R. Co., Chicago, St. Paul Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Illinois Central R. R. Co., Chicago, Great Western Railroad Co., Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. and Chicago, Rock Island & Pacific Ry. Co., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein John W. Keogh is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 14th day of March, in the year of our Lord one thousand nine hundred twenty-one.

SAMUEL ALSCHULER,
Judge.

[Endorsed:] No. 2776. United States Circuit of Court of Appeals, Seventh Circuit. John W. Keogh vs. Chicago & N. W. Ry. Co., et al. Citation. Filed Mar. 18, 1921. Edward M. Holloway, clerk.

We hereby accept service of the above citation. Dated March 17th, 1921.

NELSON J. WILCOX,
ROBERT H. WIDDICOMBE,
Attys. for C. & N. W. Ry. Co., Hiram R. McCullough and Marvin Hughitt, Jr.
W. S. HORTON,
R. V. FLETCHER,
Attys. for I. C. R. R. Co., D. W. Longstreet and E. R. Boyd.
NELSON J. WILCOX,
ROBERT H. WIDDICOMBE,
Attys. for C. St. P. Minn. & Omaha Ry. Co.
JOHN L. McINERNEY,
Attys. for Minn. St. P. & S. Ste. Marie Ry. Co.
BRUCE SCOTT,
J. C. JAMES,
KENNETH F. BURGESS,
Attys. for C. B. & Q. R. R. Co. and Claude C. Burnham.
CARL S. JEFFERSON,
O. W. DYNES,
Attys. for C. M. & St. P. Ry. Co., Edward S. Keeley and Henry E. Pierpont.
WALTER H. JACOBS,
RALPH M. SHAW,
Attys. for C. Gt. Western R. R. Co. and Oscar Townsend.
W. F. DICKINSON,
A. B. ENOCH,
Attys. for C. R. I. & P. Ry Co., James E. Gorman and Harry Gower.

Endorsed on cover: File No. 28,180. U. S. Circuit Court Appeals, 7th Circuit. Term No. 823. John W. Keogh, plaintiff in error, vs. Chicago & Northwestern Railway Company et al. Filed March 26th, 1921. File No. 28,180.

NO. 826 51

APR 2 1921

JAMES D. MAHER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

JOHN W. KEOGH,

Petitioner,

vs.

CHICAGO & NORTHWESTERN RY. CO., CHICAGO, BURLINGTON & QUINCY R. R. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RY. CO., ILLINOIS CENTRAL R. R. CO., CHICAGO, GREAT WESTERN RAILROAD CO., MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO., CHICAGO, ROCK ISLAND & PACIFIC RY. CO., HIRAM R. McCULLOUGH, MARVIN HUGHITT, JR., CLAUSE G. BURNHAM, OSCAR TOWNSEND, EDWARD S. KEELEY, HENRY E. PIERPONT, JAMES E. GORMAN, HARRY GOWER, DAVID LONGSTREET and E. R. BOYD,

Respondents.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,

COUNSEL FOR PETITIONER.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

JOHN W. KEOGH,
Petitioner,

vs.

CHICAGO & NORTHWESTERN RY. CO., CHICAGO, BURLINGTON & QUINCY R. R. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RY. CO., ILLINOIS CENTRAL R. R. CO., CHICAGO, GREAT WESTERN RAILROAD CO., MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO., CHICAGO, ROCK ISLAND & PACIFIC RY. CO., HIRAM R. McCULLOUGH, MARVIN HUGHITT, JR., CLAUSE G. BURNHAM, OSCAR TOWNSEND, EDWARD S. KEELEY, HENRY E. PIERPONT, JAMES E. GORMAN, HARRY GOWER, DAVID LONGSTREET and E. R. BOYD,
Respondents.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of John W. Keogh respectfully shows to the court as follows:

This action was brought in the District Court of the United States for the Northern District of Illinois to

recover treble damages under Section 7 of the Anti-Trust Act. (26 Stat. at L 209.) The declaration charged in substance that the defendant corporations, who are competing common carriers, entered into an agreement and combination to restrain competition and to fix arbitrary, non-competitive freight rates; that they formed an association known as "The Western Trunk Line Committee," and through this committee fixed arbitrary, uniform and non-competitive freight rates; that all competition was thereby destroyed and the rates were immediately increased over the rates which had theretofore existed and were greatly in excess of the rates which but for such combination would have prevailed; that such agreement and the acts of defendants thereunder were in violation of Sections 1 and 2 of the Anti-Trust Act; that plaintiff was engaged in the business of manufacturing and selling excelsior and tow, and owned and operated a mill in St. Paul, Minnesota, where he shipped his products to consignees at Chicago and other points over the lines of the defendant carriers; that on September 1, 1912, defendants, acting in concert, and under the terms of said agreement, increased the freight rates on his products from St. Paul to Chicago and other points, and as a direct result thereof he paid large sums of money to defendant corporations in increased freight charges and his profits were decreased from $1.00 a ton to 30 cents a ton, and he thereby lost large sums of money. The declaration set forth an itemized list of the shipments showing the rates which were in effect both before and after the increase.

The agreement among the defendants and their acts in carrying out the same as set forth in the declaration are substantially the same as in the case of *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, wherein it was held that the defendant carriers were act-

ing in violation of Sections 1 and 2 of the Anti-Trust Act.

The defendants filed special pleas setting forth in substance that the rates complained of had been held to be reasonable by the Interstate Commerce Commission on a hearing on a complaint filed by the plaintiff. The District Court held on general demurrers to the special pleas that such pleas set forth a complete defense to the suit. Plaintiff elected to stand by his demurrers and the suit was dismissed and judgment rendered against plaintiff for costs.

The case was taken by writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, which court, on January 4, 1921, affirmed the judgment of the District Court. The gist of the holding of the Court of Appeals is that the freight rates complained of having been held by the Interstate Commerce Commission to be reasonable, the defendants were required by law to collect such rates and plaintiff was required by law to pay the same and therefore defendants could not be held liable to plaintiff for the consequences of the acts charged. The Court did not pass upon the question as to whether or not the defendants were guilty of conspiracy under the Anti-Trust Law.

The Court of Appeals in its opinion says:

> "The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission."

Your petitioner represents that this is a misapprehension of the real issue presented by the record. That issue may be correctly stated as follows: Can competing common carriers combine and fix arbitrary and non-com-

petitive rates so as to eliminate all competition in violation of Sections 1 and 2 of the Anti-Trust Act, and thereby increase the rates over the then prevailing competitive rates, and escape payment of the damages thus caused to shippers having to pay such higher rates by showing that the rates so established by common agreement are not so excessive as to meet with the disapproval of the Interstate Commerce Commission?

The District Court and the Court of Appeals have, by their decisions, answered this question in the affirmative. Such decisions are in conflict with the principles frequently announced by this court, particularly in *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505; *Chattanooga Fdry. & P. Works* v. *Atlanta*, 203 U. S. 390; *Thomsen* v. *Cayser*, 243 U. S., 66, 85.

The agreement and combination set forth in the declaration in this case is the same as was held illegal by this Court in the *Trans-Missouri Freight Association* and *Joint Traffic* cases, *supra*. In the *Joint Traffic* case, this Court, in speaking of such agreements, said (at page 565):

> "The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail * * *."

Your petitioner is advised and represents that the effect of the decision of the Court of Appeals is to nullify Section 7 of the Anti-Trust Act so far as common carriers are concerned. The said court has confused the Anti-Trust Act and the Commerce Act.

In its opinion it says:

> "Congress in the passage of the Act to Regulate Commerce having provided the rules of law applicable to freight charges, and, the administrative board,—Interstate Commerce Commission—having deter-

> mined the rates fixed by the schedules complained of were within the statute, the plaintiff has no other alternative than to regard the rates as reasonable and as having been well established."

Such holding is contrary to the letter and spirit of numerous decisions of this Court construing and applying the Anti-Trust Act, wherein it is held that the purpose of the Anti-Trust Act is to secure to the public the benefits of free competition which it is held necessarily will result in lower rates. Among such decisions are the following:

> *Thomsen v. Cayser*, 243 U. S. 66;
> *U. S. v. Union Pac. R. R. Co.*, 226 U. S. 61;
> *Northern Securities Case*, 193 U. S. 197;
> *Eastern States R. L. D. Assn. v. U. S.*, 234 U. S. 600;
> *Grenada Lbr. Co. v. Mississippi*, 227 U. S. 433.

The Interstate Commerce Commission did not have any authority to pass upon the question in this case. In the report of the Commission in the *Keogh* case, which was made a part of the special pleas of the defendants, in speaking of the rates now in question, it is said (26 I. C. C. 692):

> "The record justifies an inference that these rates were instituted as the result of a common understanding * * *. The one question, however, which we have to solve under the act to regulate commerce is whether these advanced rates are reasonable or not."

Your petitioner respectfully submits that because of the far-reaching effect of such a construction of the Anti-Trust Act as applied to common carriers, if upheld, and because the decision of the Court of Appeals is in conflict with the principles and reasoning of this court in the many decisions construing the Anti-Trust Act, the

judgment of the Court of Appeals should be reviewed by this court.

Your petitioner respectfully represents that on account of doubt as to the proper mode of review he has also sued out a writ of error to the said Court of Appeals in this case and he presents herewith a transcript of the record in the said Circuit Court of Appeals, which is also filed as a return to said writ of error, and asks that the same be considered as a part of this petition.

Wherefore your petitioner prays that this Honorable Court grant a writ of certiorari in this case to the United States Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this Honorable Court, to the end that said cause may be reviewed by this court, and that the judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

W. T. Arden

C. R. Latham

T. P. Young

Attorneys for Petitioner.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss:

H. P. Young, being duly sworn, says that he is one of the attorneys for John W. Keogh, the petitioner herein; that he has prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

H. P. Young

Subscribed and sworn to before
me this 29th day of March, 1921.

W. M. Ryall
Notary Public.

NO. [redacted]51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

JOHN W. KEOGH,

Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,

Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. T. ALDEN,
C. R. LATHAM,
H. P. YOUNG,
COUNSEL FOR PLAINTIFF IN ERROR.

CHARLES MARTIN,
Of Counsel.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

SUBJECT INDEX.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

JOHN W. KEOGH,

Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,

Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted by John W. Keogh, plaintiff in error, against the various railroad companies and individual defendants to recover treble damages under the provisions of the Anti-Trust Act. The declaration was filed on November 25, 1914, and alleges in substance that the plaintiff was, on September 1, 1912, and for several years prior thereto, engaged in the business of manufacturing and selling excelsior and tow, with his principal office and place of business in Chicago, Illinois, and that from 1909 to the time of filing the suit he owned and operated a factory at St. Paul, Minnesota, where he

manufactured excelsior and tow and sold and shipped the same to various persons, firms and corporations in the several states of the United States in interstate trade and commerce within the meaning of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (Rec. 4); that the defendant corporations during the said time were common carriers and competing interstate railway companies engaged in the business of transporting and carrying passengers and freight by railroad from St. Paul, Minnesota, to various points in the United States, and engaged in interstate trade and commerce within the meaning of the said Act (Rec. 4); that the individual defendants are the officers, agents and employees of the defendant corporations (Rec. 4); that from September 1, 1912, to the filing of the suit, plaintiff has paid large sums of money to the various defendant companies for transporting excelsior and tow from St. Paul; that on, to wit: September 1, 1912, and for several years prior thereto, there was maintained, and continuously ever since has been maintained, an association known as "The Western Trunk Line Committee" (Rec. 5); that this association is maintained at the expense of the various defendant corporations who are members thereof; that the members of the association are competing common carriers engaged in interstate commerce; that the principal object of the association is to agree upon, fix, maintain and publish uniform, arbitrary and non-competitive freight rates to competing points in the United States (Rec. 5); that the members of the association, including the defendants, hold meetings from time to time and fix and change freight rates (Rec. 6); that one of the rules of the association requires a unanimous vote of all the members to fix or change a freight rate, and that all the members of the association must

abide by the decision of the association, and maintain, charge and publish the freight rates so fixed and agreed upon by the said association; that any member refusing or neglecting to maintain, charge and publish rates so fixed by the association shall be expelled and shall suffer other penalties (Rec. 6); that throughout the period in question the defendant corporations were members of the said Western Trunk Line Committee, and said defendant corporations and certain of the individual defendants as officers and agents of the defendant corporations and as members of the Western Trunk Line Committee met from time to time in Chicago, and agreed upon, fixed and maintained and published freight rates to various competing points in the several states; that the freight rates so agreed upon were arbitrary, uniform, unreasonable and non-competitive and not based on what would be a fair remunerative rate to the carrier transporting such freight traffic, and that the defendant corporations charged, maintained and published said arbitrary, uniform, unreasonable and non-competitive freight rates in violation of the said Act of Congress (Rec. 7).

Plaintiff in error further alleged that as a result of these agreements and the carrying out of the said plan, all competition as to freight rates charged for the transportation of excelsior and tow from St. Paul, Minnesota, which had theretofore existed between the defendant corporations was prevented and destroyed by the fixing of said arbitrary, uniform and non-competive freight rates, and that the plaintiff paid freight rates greatly in excess of the freight rates which but for the said unlawful conspiracy would have prevailed, for the transportation of excelsior and tow from St. Paul to the various other points in interstate commerce, by which he was greatly damaged. (Rec. 7.) The plaintiff further al-

leged that said defendants during the period aforesaid unlawfully conspired to and did restrain trade and commerce among the several states of the United States, contrary to the provisions of the said act of Congress, and that by reason of the said conspiracy plaintiff had been injured in his business and property, in that the freight rates which the defendant corporations collected for the transportation of excelsior and tow manufactured by plaintiff were greatly increased by reason of said conspiracy over the freight rates which would have been charged and collected by said defendant corporations, or some of them, for the transportation of said excelsior and tow if no such conspiracy had been entered into. (Rec. 7.)

The declaration then sets forth a detailed statement of shipments of excelsior and tow made by the plaintiff from St. Paul to various points in the United States from September 1st to the commencement of the suit, showing the number of shipments, the destination, the rate and the freight paid. (Rec. 9-17.) It is further alleged that the defendant corporations embraced all the common carriers that transported and carried freight from St. Paul, and that it was necessary for him to patronize all, or some of said companies (Rec. 18); that the direct effect and consequence of said conspiracy was that there was paid to the defendants, or some of them, for the transportation of said excelsior and tow a much larger sum of money than would have been paid to said defendant corporations if no such conspiracy had existed, and plaintiff sets forth an itemized statement showing overcharges on pages 19 to 24 of the record, and it is alleged that by means thereof the profits of the plaintiff during the period in question were decreased in the sum of, to wit: $5,000. (Rec. 24.)

The second count alleges substantially the same facts with reference to the business of the plaintiff and the organization of the Western Trunk Line Committee and the membership of the defendants therein and the objects and purposes of that association. (Rec. 24, 25, 26.) It is further alleged that throughout the period from September 1, 1912, to the filing of the suit, the defendant corporations carried on their business in accordance with and under the plan of the Western Trunk Line Committee and all competition as to freight rates for the transportation of excelsior and tow from St. Paul which had theretofore existed between the defendant corporations was prevented and destroyed by the fixing of said arbitrary uniform and non-competitive freight rates, which were greatly in excess of the freight rates but for said conspiracy would have prevailed (Rec. 27); that in November, 1909, plaintiff built a tow and excelsior mill in St. Paul, Minnesota, at an expense of $60,000 and in 1910 began to manufacture excelsior and tow and sold and shipped the same to various persons in the several states in the United States and from that date until the formation of said conspiracy on September 1, 1912, had shipped an average of 9000 tons of excelsior and tow per year and that the net profit per ton was $1.00; that when said combination was entered into on September 1, 1912, the defendant corporations increased the freight rates on excelsior and tow from St. Paul to Chicago and other points; that the rates so charged were not competitive but were the result of said combination and conspiracy and by means thereof all competition on said freight rates was destroyed (Rec. 28); that since September 1, 1912, plaintiff was compelled, in order to have the excelsior and tow so manufactured by him, transported from St. Paul to various persons in the several states, to patronize one or more of the defendant cor-

porations, as they embraced all the common carriers transporting freight by railroad from St. Paul (Rec. 29); that the direct effect and consequence of the conspiracy was that the net profits of the plaintiff on excelsior and tow manfuactured by him decreased from $1.00 per ton to 30 cents per ton; that the said contract and combination was in restraint of trade and commerce among the several states of the United States, contrary to the provisions of the Act of Congress aforesaid; that as a result of the said conspiracy, the value of plaintiff's plant has been decreased from $60,000 to $25,000 (Rec. 29); plaintiff prays for three-fold damages.

The defendants filed separate pleas of the general issue and notices of special matters to be shown in defense. (Rec. 33, 35-40.) The special matters set up in the notices were in substance that the rates complained of in the declaration were those that were subject to the jurisdiction of the Interstate Commerce Commission; that in the months of September, October, November and December, 1912, the defendants filed schedules or tariffs with the Interstate Commerce Commission; that these tariffs so scheduled and published carried the rates on excelsior and tow mentioned in the declaration (Rec. 36); that plaintiff had filed a complaint with the Interstate Commerce Commission, which upon a hearing, held that the rates from St. Paul to Chicago were reasonable and that the rates from St. Paul to interstate destinations other than Chicago were lawful in so far as they did not represent advances over previous rates of more than three and one-half cents per 100 pounds (Rec. 37); that plaintiff filed an application for rehearing, which was denied, and later plaintiff filed a second petition to have the case re-opened, which was granted for the purpose of considering whether carload rates on tow and excelsior should be made on a 30,000 pound minimum basis

lower than rates fixed by the commission on rates by the 20,000 pound minimum basis, and after a hearing, the commission refused to prescribe a lower rate (Rec. 38); that after the decisions of the commission above referred to, the defendants filed amended and modified schedules applying on excelsior and tow from St. Paul to St. Louis, Missouri, Des Moines, Iowa, and other destinations which were in accordance wtih the report and order of the commission and later complaints were received about the rates and the Interstate Commerce Commission reopened the case and fixed and prescribed rates from St. Paul to points on the Missouri River and other points mentioned in the declaration which were in most cases the same as those established by the defendants (Rec. 38, 39); that all the tariffs and schedules of which the plaintiff complains have been found by the Commission to be reasonable, lawful and non-discriminatory. (Rec. 39.)

The case came on for trial before the District Court and a jury and after some evidence was introduced on behalf of the plaintiff, the Court in ruling on the admissibility of evidence stated that if the facts set forth in the amended notice of special matters to be offered in evidence could be proved, it was his opinion that such facts would constitute a defense to the case. Thereupon, by agreement, the jury was discharged and the special matters set forth in the amended notices were considered as having been well pleaded in one or more special pleas to the declaration, and that the four reports and orders of the Interstate Commerce Commission in the tow and excelsior cases should be considered as having been set forth and incorporated in the special pleas and that a general demurrer to each of said special pleas be interposed on the ground that the facts alleged in said special pleas do not constitute a defense at law. The Court

thereupon, after argument, overruled the demurrers and the plaintiff, electing to stand by the demurrers, the suit was dismissed and judgment entered against the plaintiff for costs. (Rec. 41.) A writ of error was duly allowed and the record brought to the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the judgment. (Rec. 55; 271 Fed. 444.)

Plaintiff has sued out this writ of error to review the judgment of the Court of Appeals.

The Court of Appeals in its opinion discusses the Commerce Act and proceedings thereunder and ignores the Anti-Trust Act under which this action was commenced. The Court holds that as Congress has vested the rate making power in the Interstate Commerce Commission and that board having decided the rates were not unreasonable, plaintiff has no alternative but to regard the rates as lawful in all respects and consequently could not suffer any damages by paying the rates held by the Interstate Commerce Commission not to be excessive. It is also said that the proper procedure was to file complaint with the Commission and if it had held that the rates were not unreasonable, then plaintiff had no further remedy; if, however, the Commission held that the rates were unreasonable, then he had his remedy by action in court or before the Commission. The provisions of the Anti-Trust Act were thus ignored altogether.

The question before this Court is whether the findings of the Interstate Commerce Commission in the proceedings under the Commerce Act as set up in the special pleas, constitutes a bar to this suit for damages under the Anti-Trust Act.

SPECIFICATION OF ERRORS.

1. The District Court and Circuit Court of Appeals erred in holding that the matters set up in the special pleas filed by the defendants constituted a defense to plaintiff's suit.

2. The District Court and Circuit Court of Appeals erred in holding that the finding of the Interstate Commerce Commission that the rates complained of in the declaration were not unreasonable, constituted a bar to an action by plaintiff to recover treble damages under Section 7 of the Anti-Trust Act.

3. The District Court and the Circuit Court of Appeals erred in holding that a number of naturally competing common carriers who have entered into an agreement to restrain competition and fixed freight rates at a higher level than theretofore prevailed under competitive conditions in violation of the Anti-Trust Act are not liable under the Anti-Trust Act to persons injured by reason of the higher rates charged as the result of the unlawful combination, unless such rates are first held by the Interstate Commerce Commission to be unreasonable.

4. The Circuit Court of Appeals erred in holding that a suit for damages under Section 7 of the Anti-Trust Act cannot be maintained against common carriers until a finding of the Interstate Commerce Commission that the rate is unreasonable has first been obtained.

5. The Circuit Court of Appeals erred in affirming the judgment of the District Court overruling the demurrers to the special pleas of defendants and dismissing the suit.

BRIEF OF ARGUMENT.

I.

Sections 1 and 2 of the Anti-Trust Act prohibit all contracts and combinations which directly restrain trade or commerce.

26 Stat. 209; 8 U. S. Comp. Stat., 1916, Secs. 8820, 8821.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 341; 41 L. Ed. 1007, 1028.

United States v. *Joint Traffic Association,* 171 U. S. 505, 568; 43 L. Ed. 259, 287.

United States v. *Standard Oil Co.,* 221 U. S. 1, 66; 55 L. Ed. 619, 647.

Hopkins v. *United States,* 171 U. S. 578, 592; 43 L. Ed. 290, 296.

Anderson v. *United States,* 171 U. S. 604, 615; 43 L. Ed. 300, 305.

Northern Securities Co. v. *United States,* 193 U. S. 197, 331; 48 L. Ed. 679, 697.

Thomsen v. *Cayser,* 243 U. S. 66, 85; 61 L. Ed. 597, 606.

II.

Competition is the natural law of trade and the Anti-Trust Act was intended to prevent any contracts or combinations which destroy or stifle competition.

United States v. *Joint Traffic Asso.,* 171 U. S. 505, 577; 43 L. Ed. 259, 290.

Eastern States R. L. D. Asso. v. *U. S.*, 234 U. S. 600, 613; 58 L. Ed. 1490, 1499.

Northern Securities Co. v. *United States*, 193 U. S. 197, 331, 352; 48 L. Ed. 679, 697, 706.

United States v. *Union P. R. Co.*, 226 U. S. 61, 82; 57 L. Ed. 124, 131.

National Cotton Oil Co. v. *Texas*, 197 U. S. 115; 49 L. Ed. 689.

III.

The mere fact that the rates fixed and maintained by the combination or agreement among the defendant companies were not excessive or unreasonable does not constitute a defense to an action under the Anti-Trust Act.

United States v. *Standard Oil Co.*, 221 U. S. 1, 65; 55 L. Ed. 619, 646.

United States v. *American Tobacco Company*, 221 U. S. 106, 179; 55 L. Ed. 663, 693.

United States v. *Joint Traffic Association*, 171 U. S. 505, 571; 43 L. Ed. 259, 288.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290, 339; 41 L. Ed. 1007, 1027.

United States v. *Union P. R. Co.*, 226 U. S. 61, 83; 57 L. Ed. 124, 132.

Northern Securities Co. v. *United States*, 193 U. S. 197, 340; 48 L. Ed. 679, 701.

Thomsen v. *Cayser*, 243 U. S. 66, 86; 61 L. Ed. 597, 607.

Grenada Lbr. Co. v. *Mississippi*, 217 U. S. 433; 54 L. Ed. 826, 830.

IV.

The agreement among the defendants to adopt and maintain uniform and non-competitive freight rates and their acts in carrying out the agreement constituted a violation of the Anti-Trust Act and rendered the defendants liable to any one who by reason thereof suffered injury to his business or property.

United States v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 339; 41 L. Ed. 1007, 1027.

United States v. *Joint Traffic Association*, 171 U. S. 505, 568; 43 L. Ed. 259, 287.

United States v. *Standard Oil Company*, 221 U. S. 1; 55 L. Ed. 619.

Thomsen v. *Cayser*, 243 U. S. 66; 61 L. Ed. 597.

V.

The right of a railroad company to charge reasonable rates does not include the right to enter into an agreement or combination to maintain reasonable rates.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290, 339; 41 L. Ed. 1007, 1027.

United States v. *Joint Traffic Association*, 171 U. S. 505; 43 L. Ed. 259.

Grenada Lbr. Co. v. *Mississippi*, 217 U. S. 433, 440; 54 L. Ed., 826, 830.

United States v. *Union P. R. Co.*, 226 U. S. 61, 86; 57 L. Ed. 124, 132.

VI.

It was the duty of the defendants to compete and the Anti-Trust Act has a stricter application to them than to combinations of persons or corporations engaged in private pursuits.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 336; 41 L. Ed. 1007, 1026.

Thomsen v. *Cayser,* 243 U. S. 66, 85; 61 L. Ed. 587, 606.

United States v. *Union P. R. Co.,* 226 U. S. 61, 86; 57 L. Ed. 124, 132.

VII.

The natural effect of competition is to lower rates and the direct and immediate effect of the agreement or combination described in the declaration was to increase the rates over the prevailing competitive rates.

Record pages 7, 18 and 28.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 339; 41 L. Ed. 1007, 1027.

Northern Securities Co. v. *United States,* 193 U. S. 197, 327; 48 L. Ed. 679, 696.

United States v. *Joint Traffic Association,* 171 U. S. 505, 565, 577; 43 L. Ed. 259, 286, 290.

VIII.

The declaration sets forth facts showing an illegal combination under the Anti-Trust Act and alleges that plaintiff by reason thereof sustained injury to his business and property. He is, therefore, entitled to have the issues, including the damages, passed upon by a court and jury.

(*a*) The declaration alleges that plaintiff was compelled to pay more than a reasonable competitive rate

and that his business was injured and he suffered a loss of profits. (Rec. 18, 28, 29.) These are proper elements of damage under the statute.

Thomsen v. *Cayser,* 243 U. S. 66; 61 L. Ed. 587.
Chattanooga Foundry Co. v. *Atlanta,* 203 U. S. 390; 51 L. Ed. 241.

(*b*) A general allegation of damages is sufficient, especially where no special demurrer or motion to make more specific is filed.

Thomsen v. *Union Castle Mail S. S. Co.,* 166 Fed. 251.
Meeker v. *Lehigh Valley R. Co.,* 183 Fed. 551.

(*c*) The amount of such damages should have been submitted to the jury.

Thomsen v. *Cayser,* 243 U. S. 66; 61 L. Ed. 587.

IX.

The findings of the Interstate Commerce Commission are not a bar to this suit nor even admissible in evidence.

(*a*) The Commission has no power to decide questions arising under the Anti-Trust Act, and it has so held in the decisions relied upon in the special pleas of defendants.

Re rates on Excelsior and Flax Tow, 26 I. C. C. 692.
Re Excelsior and Flax Tow cases, 36 I. C. C. 349, 362.
Tift v. *Southern R. Co.,* 10 I. C. C. 548.

(*b*) The Commission is an administrative body and its findings have only the effect provided by statute. The Act creating it does not give its findings any effect in other than proceedings under the Commerce Act. Even

where the Commission makes a money award, its order is only *prima facie* evidence of the facts therein stated.

Section 16 Commerce Act; Sec. 8584, Vol. 8, U. S. Comp. Stat.

Meeker v. *Lehigh Valley R. Co.,* 236 U. S. 412; 59 L. Ed. 644.

(*c*) The finding of the Commission relates to a maximum rate which carriers must not exceed. It has no power to name the specific rate to be charged nor can it determine the reasonable rates that would prevail under natural or competitive conditions.

Section 15, Commerce Act; Sec. 8583, Vol. 8, U. S. Comp. Stat., p. 9198.

Meeker v. *Lehigh Valley R. Co.,* 236 U. S. 412; 59 L. Ed. 644.

Skinner & Eddy Corporation v. *United States,* 249 U. S. 557; 63 L. Ed. 772.

Re Excelsior and Flax Tow Cases, 36 I. C. C. 365.

(*d*) Plaintiff is entitled under the Constitution to have a jury pass upon the issues and assess the damages.

Meeker v. *Lehigh Valley R. Co.,* 236 U. S. 412; 59 L. Ed. 644.

Thomsen v. *Cayser,* 243 U. S. 66, 88; 61 L. Ed. 587, 607.

Meeker v. *Lehigh Valley R. Co.,* 183 Fed. 551.

(*e*) Even in an action under the Commerce Act to recover damages for excessive freight charges, wherein the award of damages made by the Commission is admitted as *prima facie* evidence, the plaintiff is entitled to a jury trial.

Meeker v. *Lehigh Valley R. Co.,* 236 U. S. 412; 59 L. Ed. 644.

Southern Pac. Co. v. *Goldfield Consol. Milling Co.,* 220 Fed. 14 (C. C. A. 9 Cir.).

(*f*) The reports of the Commission show that the rates were actually increased from 10 cents to 13½ cents a hundred pounds.

Record, page 37.

Re Rates on Excelsior and Flax Tow, 26 I. C. C. 690, 692.

X.

The mere fact that the increased rates were filed with the Commission and published by the defendants separately does not exempt them from liability under the Anti-Trust Act for their unlawful acts in agreeing jointly upon the rates. The Commerce Act cannot be made a refuge for violators of the Anti-Trust Act.

United States v. *Joint Traffic Association*, 171 U. S. 505; 43 L. Ed. 259.

ARGUMENT.

I.

Under the Anti-Trust Act all agreements and combinations among competitive carriers for fixing and maintaining uniform rates are in restraint of trade and unlawful. It is immaterial whether the rates so fixed are reasonable or unreasonable. The test is whether the agreement is of such a character as to directly affect or restrain interstate commerce. Measured by this rule the combination set forth in the declaration is illegal.

The declaration charges a combination and agreement among the defendants for the purpose of fixing uniform, arbitrary, and non-competitive freight rates to be charged and maintained by all the defendant companies from St. Paul to Chicago and other competitive points, and that the rates thus agreed upon were higher than the competitive rates then prevailing and were put into effect by all the defendant railroad companies in pursuance of said agreement. The special pleas filed by the various defendants allege that the increased rates complained about were held reasonable by the Interstate Commerce Commission.

Assuming that the finding of the Commission is competent and well pleaded, the question at once arises whether an agreement and combination such as set out in the declaration for the purpose of fixing and maintaining uniform and non-competitive rates but which are not in excess of rates permitted by the Interstate Com-

merce Commission is within the inhibition of the Anti-Trust Act.

We contend that the fact that the rates so fixed by an agreement and combination of rival and competitive railroads are not excessive or unreasonable, is utterly immaterial.

Sections 1 and 2 of the Act of 1890 are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court." (26 Stat. at Large, 209; 8 U. S. Comp. Stat. 1916, Secs. 8820, 8821.)

These two sections of the Act have been before this Court for construction a great many times. Some of the agreements involved were very similar to the agreement set forth in the declaration in the present case. Particularly is this true of the *Trans-Missouri* and *Joint Traffic Association cases,* which we deem conclusive of this case.

The decisions establish the rule as applied to common carriers that if the agreement or combination directly restrains competition it is in violation of the statute.

In *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; 41 L. Ed. 1007, this Court considered an agreement almost identical with the one in the case at bar. The defendant railroad companies had entered into an agreement known as the "Trans-Missouri Freight Association," by which they agreed to be governed by the provisions contained in the agreement. Among the objects and purposes of the agreement as stated therein was the establishing and maintaining of *reasonable* rates, rules and regulations on all freight traffic. The association held meetings at which rates and regulations were considered and determined. It was claimed that the association and agreements between the defendant companies was in violation of the Anti-Trust Act. The defense set up by the defendants was that all the rates and regulations which they had established through the association were just and reasonable and therefore not within the prohibition of the act of Congress and also that the public was benefited by reason of the acts of the association.

Two questions were before the Court for decision; first, whether the Anti-Trust Act applied to common carriers, and, second, whether the agreement set forth in the bill violated the provisions of that act. The Court answered both questions in the affirmative. The contention was made by the defendants that even if the act applied to railroad companies, it only applied to contracts or combinations which were in *unreasonable* restraint of trade and that if the rates which were established by the contract or combination were not unreasonable, the defendants would not be guilty of violating the act.

The Court pointed out the distinction between the right of one railroad company to charge reasonable rates and an agreement among a number of companies to charge

reasonable rates. At page 339 (L. Ed. 1027), the Court said:

> "The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

In discussing the particular agreement the Court said (p. 341, L. Ed. 1028):

> "Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining *reasonable* rates, rules, and regulations on all freight traffic, both through and local.' To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its *direct, immediate* and *necessary* effect is to put a restraint upon trade or commerce as described in the Act."

The same question came before the Court again in the case of *United States* v. *Joint Traffic Association,* 171

U. S. 505; 43 L. Ed. 259. The agreement in this case was substantially the same as in the *Trans-Missouri Freight Association case.* The alleged purpose of the agreement between the defendant railroad companies was to fix *reasonable and just rates,* rules and regulations on interstate traffic. It also provided for co-operation with the Interstate Commerce Commission. It was contended that the rates fixed were in all instances fair and reasonable and that the Anti-Trust Act did not prohibit any contracts as in restraint of trade which provided a reasonable rate.

It was also argued that as the rates adopted were the rates fixed by each company itself and filed with the Interstate Commerce Commission the case was distinguishable from the *Trans-Missouri case.* But the Court said that the distinction was immaterial and that there was no substantial difference between the agreements in the two cases. The Court, in discussing the effect of the agreement, said (p. 565, L. Ed. 286):

> "The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground."

The Court also said in speaking of an agreement to maintain reasonable and just rates (p. 568, L. Ed. 287):

> "Such an agreement *directly* affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between states it is interstate commerce. *The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.*" (Italics ours.)

It is further said (p. 571, L. Ed. 288):

> "We do not think that when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one state to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges *higher than they might otherwise be under the laws of competition.* And this is so even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased." (Italics ours.)

As to the effect of competition it is said (p. 577, L. Ed. 290):

> "The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce."

It was contended, however, by counsel for the defendants in error that the *Trans-Missouri* and *Joint Traffic Association cases* have been overruled by this Court in the *Standard Oil* and *American Tobacco Company cases.*

An examination of those two decisions and other decisions of the court shows that there is no basis for such claim. It is sufficient to say that this Court in its opinion in the *Standard Oil case* expressly states that it is not departing from the doctrine established in the earlier cases. In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, in discussing the claim that the *Standard Oil case* overruled previous decisions, this Court said (p. 179, L. Ed. 693):

> "In that case it was held, *without departing from any previous decision of the court,* that as the statute had not defined the words 'restraint of trade,' it became necessary to construe those words—a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes *erroneously* attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Asso.* and *Joint Traffic cases,* 166 U. S., 290; 41 L. L. Ed. 1007; 17 Sup. Ct. Rep. 540, and 171 U. S. 505; 43 L. Ed. 259; 19 Sup. Ct. Rep. 25). That such view was a mistaken one was fully pointed out in the *Standard Oil case,* and is additionally shown by a passage in the opinion in the *Joint Traffic case,* * * *."

The *Joint Traffic case* was cited with approval in *United States* v. *Union P. R. Co.,* 226 U. S. 61; 57 L. Ed. 124, 82, L. Ed. 131, and in *Thomsen* v. *Cayser,* 243 U. S. 66; 61 L. Ed. 597.

The latter case affords a good illustration of the result of the mistaken view that the *Standard Oil case* overruled the *Trans-Missouri* and *Joint Traffic cases.* That case, reported in the Court of Appeals as *Thomsen* v. *Union Castle Mail S. S. Co.,* 166 Fed. 251, was very similar to the case at bar. Plaintiff put in a part of his testimony when the court dismissed the complaint. The complaint alleged in substance that the defendants were engaged as common carriers in the South African trade and entered into a combination in restraint of foreign trade and commerce in violation of the Anti-Trust Act by means of a scheme under which they united as "The South African Lines," held conferences for the purpose of fixing rates and did fix rates, prevented competition, etc. The Court of Appeals said, at page 253:

> Whether the restraint of trade imposed by the combination was reasonable or unreasonable is, under repeated decisions of the Supreme Court, immaterial."

This case came before the Court of Appeals the second time and is reported in 190 Fed. 536. The Court on the second appeal held that its ruling on the first appeal to the effect it was immaterial whether the restraint of trade imposed by a combination was reasonable or unreasonable was erroneous in view of the decisions of the Supreme Court in the *Standard Oil* and *Tobacco cases*, and that as the trial court had proceeded upon the principle of law that it was immaterial whether the restraint was reasonable or unreasonable, as announced on the first appeal, its judgment must be reversed, unless the Court could say as a matter of law that the acts of the defendants appearing in the record amount to a combination in *unreasonable* restraint of trade. The Court said that it was impossible for it to hold as a matter of law that such acts amounted to a combination in unreasonable restraint of trade. The case came to the Supreme Court on a writ of error and is reported as *Thomsen* v. *Cayser*, 243 U. S. 66; 61 L. Ed. 597. In commenting upon the statement of the Court of Appeals that this Court in the *Standard Oil* and *Tobacco cases* had placed a different construction upon the Anti-Trust Act than in the prior decisions of the Court, it was said, at page 84, L. Ed. 606:

> "But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them, or asserted implications from them, were example of the rule and show its thorough adequacy to prevent evasions of the policy of the law 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.' And we have since declared that it cannot 'be evaded by good motives,' the law being 'its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.' *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20,

49; 57 L. Ed. 107, 117; 33 Sup. Ct. Rep. 9; *International Harvester Co.* v. *Missouri*, 234 U. S. 199; 58 L. Ed. 1276; 52 L. R. A. (N. S.) 525; 34 Sup. Ct. Rep. 859."

In discussing the contention that the combination was a beneficial, and not a detrimental, agency of commerce the Court said (p. 86, L. Ed. 607):

> "We have already seen that a combination is not excused because it was induced by good motives or produced good results, and not such is the justification of defendants."

In applying the rule to the defendants, it is said (p. 85, L. Ed. 606):

> "The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and *it was their duty to compete, not combine;* and their duty takes from them palliation, subjects them in a special sense to the policy of the law." (Italics ours.)

The Court held that the agreement was a clear violation of the statute and reversed the judgment of the Court of Appeals and affirmed the judgment of the District Court.

This case establishes conclusively that it is a mistaken impression that the *Standard Oil case* overruled any of the previous decisions.

In the case at bar, the sole purpose of the contract or combination among the defendant companies was to fix uniform rates and thus prevent competition and a consequent lowering of freight rates, and the declaration specifically alleges that immediately after the combination was entered into the defendant companies acting in unison increased the rates charged for the transportation of plaintiff in error's goods. (Rec. 7, 19, 28.)

As the effect of the combination was to prevent all competition between the railroads as to fixing rates, and to constitute an absolute restraint of trade, it is immaterial that the uniform rates established were not unreasonable. Under the decisions of this Court the agreements and acts of defendants set forth in the declaration are clearly in violation of the Anti-Trust Act.

The declaration, furthermore, alleges that the rates were increased and were unreasonable, so that the case at bar presents a much stronger case of violation of the Act than any of the cases cited.

II.

The facts set up in the special pleas do not constitute a defense to a suit for damages under Section 7 of the Anti-Trust Act.

We have seen that a combination of carriers to establish and maintain uniform rates and to prevent competition in rate making is in violation of Sections 1 and 2 of the Anti-Trust Act even if the rates thereby established are not unreasonable. The special pleas of defendants in error set up that the rates complained of in the declaration were those that were duly filed by each defendant with the Interstate Commerce Commission, and published, as required by law, and that in proceedings instituted by plaintiff in error before the Commission the rates so filed and collected were found to be reasonable and the findings and reports of the Commission in such cases are made a part of the special pleas. (Rec. 36 to 40.)

Two questions are raised by these pleas. First, are the findings of the Interstate Commerce Commission competent or admissible in this case? Secondly, if so,

does the fact that the rates fixed and collected in pursuance of the illegal agreement were not excessive and unreasonable under the Commerce Act, constitute a defense to an action under Section 7 of the Anti-Trust Act?

Section 7 reads as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

(A) The findings of the Commerce Commission are not a bar to this suit or even admissible in evidence.

The special pleas do not deny the allegations of the declaration that the increased rates were unreasonable. In fact, they do not deny any of the averments of the declaration but set up affirmative matters, to wit: the findings of the Interstate Commerce Commission as to the rates as a bar to the action. The pleas are not intended to be sufficient as pleas of *res adjudicata.* The subject matter and the cause of action in the two proceedings obviously are not the same. The argument of defendants in error and the Court of Appeals amounts to this, that before an action under Section 7 of the Anti-Trust Act can be sustained against common carriers, plaintiff must first obtain a ruling from the Interstate Commerce Commission that the rates filed are unreasonable.

The opinion of the Court of Appeals states that plaintiff adopted the proper procedure originally in filing his complaint before the Commission, and that its finding

was conclusive, citing *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557. This statement may perhaps be correct so far as plaintiff sought any relief under the Commerce Act, but it is not true as applied to a proceeding under the Anti-Trust Act.

The Court then states that if the schedules filed in 1912 had been found by the Commission to carry unreasonable rates in violation of law and the amount of damages sustained by reason of the collecting of the rates provided in the schedules, a different case would be presented. In such a case a judicial question would be involved which might be adjudicated in a court as well as before the Commission, but that inasmuch as the Commission took the contrary view, a different situation arose. The opinion proceeds as follows (Rec. 59; 271 Fed. 444):

> "Congress, in the passage of the Act to Regulate Commerce, having provided the rules of law applicable to freight charges, and the administrative board —Interstate Commerce Commission—having determined the rates fixed by the schedules complained of, were within the statute. The plaintiff has no other alternative than to regard the rates as reasonable and as having been well established. * * * The rates in defendants' tariff schedules complained of in plaintiff's declaration having been found, by the Interstate Commerce Commission, to be reasonable, are to be treated as though they were embodied in a statute, binding as such upon both defendants and plaintiff alike."

The Court states the issue as follows:

> "The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission."

The opinion then states that a similar question was before the Court in *National Pole Co.* v. *C. & N. W. Ry.*

Co., 211 Fed. 65. A reference to that case shows that it arose under Section 8 of the Commerce Act, which provides that the "carrier shall be liable to the person injured for the full amount of damages sustained in consequence of any violation of the provisions of this Act." That case did not even remotely concern the question involved in the case at bar. The quoted excerpts from the opinion and the reliance by the Court upon the *National Pole Co. case* shows that the Court of Appeals has confused this suit with actions under Sections 8 and 9 of the Commerce Act, where an entirely different question is involved. The element of unlawful combination is ignored altogether by the Court.

No doubt the Court was misled by the argument of counsel for defendants in error, who devoted thirty pages of their argument to a discussion of the Commerce Act and decisions thereunder. They contended that the Interstate Commerce Commission alone has power to award damages for injury due to excessive rates, and cited many cases arising under Sections 8 and 9 of the Commerce Act. The Court of Appeals, following such argument, reached the conclusion that the finding of the Commission was conclusive as to the reasonableness of the rate and a bar to the prosecution of this suit.

We contend that the findings of the Commission are incompetent and inadmissible in this case. They may be conclusive, as stated in the opinion of the Court of Appeals in certain proceedings instituted under the Commerce Act, but it does not follow that they have any binding effect elsewhere. The Interstate Commerce Commission is not a court and its findings or orders canot have any greater force or effect than is given them by express statute.

Section 16 of the Commerce Act makes the orders or findings in certain cases *prima facie* evidence of the facts

therein stated. Even in cases where the Commission makes an award of damages, if not paid, a suit at law must be commenced and the award is only *prima facie* evidence of the facts stated and not even of liability.

Sec. 8584, Vol. 8, U. S. Comp. Stat.

Meeker v. *Lehigh Valley R. Co.*, 236 U. S. 412; 59 L. Ed. 644.

In order that there might be no claim that the Commerce Act deprived shippers of their common law rights, Congress provided in Section 22 of the Act as follows:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." (Section 8595, Volume 8, U. S. Comp. Stat. Anno.)

In *Pennsylvania R. Co.* v. *Puritan Coal Mining Company*, 237 U. S. 120; 59 L. Ed. 867, this Court construed this section and held that its purpose was to preserve all existing rights either at common law or by statute and to prevent the Commerce Act being interpreted as covering exclusively the whole subject of liability of carriers to shippers.

The case of *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, relied upon by the Court of Appeals for sustaining the views expressed, arose under Section 4 of the Commerce Act and contains no reference to the Anti-Trust Act. It was there contended that the action would not lie until application was first made for relief to the Interstate Commerce Commission. The Court pointed out that the contention proceeded upon a misapprehension of the plaintiff's position and that it was only in cases where plaintiff sought relief against a rate or practice that the remedy must be sought primarily by proceedings before the Commission, wherein the finding is conclusive unless the proceedings are ir-

regular or erroneous. In that particular case the contention was that the Commission had exceeded its statutory power and this Court said that in that case no proceeding before the Commission was necessary.

The opinion in the *Skinner case* contains a very clear statement of the limits of the Commission's control over rates, and in view of the fact that so much stress is laid upon the Commission's finding by defendants in error and the Court of Appeals, we take the liberty of quoting from the opinion which we think establishes clearly that the Court of Appeals in the case at bar was under a misapprehension as to the powers of the Commission and the effect of its findings as set up in the special pleas. At page 564 of the opinion it is said:

> "Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power, which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. * * *
>
> Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common-law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, *railroads still have power to fix rates as low as they choose and to reduce rates when they choose.* The Commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents." (Italics ours.)

The Court points out some of the "deterrents" by means of which the Commission may discourage unduly low rates. The opinion then continues:

> "But the lack of power to prevent by direct action excessively low rates remains; the carrier still having the option, if relief from the operation of the fourth section is denied, to keep in effect the low rate to the more distant point by lowering the rates to intermediate points.
>
> The last paragraph of Sec. 4 here in question, which was added by the Act of 1910, was designed to prevent the railroads from killing water competition by making excessively low rates. But again Congress refrained from prohibiting the carrier to reduce the rate, and *declined to confer upon the Commission power to prevent by direct action a reduction. The Act still leaves the carrier absolutely free to make as low a rate as it chooses.*" (Italics ours.)

This opinion clearly supports the contention of plaintiff in error that the Commission did not have the power to fix the particular rate which defendants in error were required to charge, and that all the Commission did was to find upon the showing made before it that the rates which had been filed by the carriers were not so excessive or unreasonable as to be prohibited by the Commerce Act. The Commission expressly refused to pass upon the charge of a violation of the Anti-Trust Act as beyond its power. (*Re Rates on Excelsior and Tow,* 26 I. C. C. 692.)

As stated in the opinion in the *Meeker case supra,* the Commission has no power to fix the minimum rates or directly to prevent the charging of unreasonably low rates. Congress has persistently refused to grant the Commission such power. This attitude of Congress is in line with the public policy, as declared in the Anti-Trust Act, to encourage carriers in making competitive rates. While the Commission has ample power to prevent exces-

sively high rates, it does not have power to fix competitive rates or specify any but the maximum rates beyond which the carriers will not be permitted to go.

Nor could any different holding be made in view of the language of the statute conferring power on the Commission to fix rates. Section 15 of the Commerce Act as amended in 1910 provides that if the Commission, after a hearing upon a complaint or on its own motion, is of the opinion that any rates, classifications, regulations or practices of any carrier subject to this Act are unjust, or unreasonable or discriminatory or otherwise in violation of any of the provisions of this Act, the Commission is authorized and empowered to "determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, *to be thereafter observed in such case as the maximum to be charged*, and what individual or joint classification, regulation, or practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission *in excess of the maximum rate or charge so prescribed*, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Italics ours.)

The Act also provides for the establishment of *maximum* joint rates.

Section 8583, Vol. 8, U. S. Comp. Stat. p. 9199.

It will be noted that while the Commission may prescribe the exact classification, regulation or practice to be followed, it can only fix the maximum rate which the carrier may not exceed.

This distinction is significant of the policy of Congress to encourage the fixing of competitive rates as required under the Anti-Trust Act. This policy of Congress, as revealed in the history and development of the legislation embodied in the Commerce Act, is clearly pointed out in the opinion of this court in *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, *supra.*

The Interstate Commerce Commission did not undertake to pass upon any issue in this case.

The Commission in the cases set forth in the special pleas, did not undertake to pass upon the question of whether there was a conspiracy in violation of the Anti-Trust Act or the damages resulting therefrom. It recognized that it had no power to determine any questions arising under that Act.

In the report of the Commission it is said in regard to these rates (26 I. C. C. 692):

> "The record justifies an inference that these rates were increased as the result of a common understanding. Furthermore, the manner in which the rates on excelsior were reduced and then both the flax tow and excelsior rates increased must raise in the fairest mind the suspicion that this course was prompted by the decision in the *Keogh case* and did not arise in the first instance in the minds of the carriers. *The one question, however, which we have to solve under the act to regulate commerce is whether these advanced rates are reasonable or not.*" (Italics ours.)

The report further shows that at a previous hearing, the Commission had held that the rates objected to by plaintiff in error were unreasonable. As illustrating the charges made in the declaration that the rates were not based on competitive conditions, we quote from the report of the Commission as follows (page 690):

"In a previous case entitled *Keogh & Co.* v. *C. B. & Q. R. R. Co.*, 24 I. C. C. 606, the rates on excelsior out of St. Paul to Chicago, St. Louis, and Missouri River points were attacked and the Commission held that the rates on excelsior should not exceed the rates contemporaneously in effect on flax tow. Following this decision the Western Trunk Line Committee published supplements to its excelsior tariffs reducing the rates on excelsior to the level of the flax-tow rates from St. Paul to Chicago and other points. Later supplements to these tariffs were filed withdrawing these reduced rates by all carriers excepting the Burlington road, and increasing the flax-tow rates to equal those on excelsior. To illustrate, the rate on excelsior between St. Paul and Chicago was 13½ cents when this rate was attacked by Keogh & Company. After the Commission said that the rate on excelsior and flax tow should be the same the carriers reduced the rate on excelsior to 10 cents, which was the flax-tow rate from St. Paul to Chicago. After these rates were in effect for a short time the carriers withdrew them and filed tariffs making the rates on flax tow and excelsior 13½ cents. They thus have effected an increase in the flax-tow rate to equal the excelsior rate which was in effect prior to the decision of the *Keogh case* and have fixed the same rate for both commodities."

It will be observed that while the special pleas of each defendant carrier alleges it filed and published the rates, the above quoted report of the Commission which is a part of the pleas recites that the Western Trunk Line Committee published the rates. This is not in compliance with the law.

In the matter of the *Excelsior and Flax-Tow cases*, 36 I. C. C. 349, which report is also set up in the special pleas, it is said (p. 362): "Violations of the Anti-Trust Act are cognizable only in the courts," and on page 365 it is said: "The Commission is invested with no power to restrain carriers from increasing unduly low rates

to a basis which will yield just and reasonable compensation for the services rendered."

In *Tift* v. *Southern R. Co.*, 10 I. C. C. Rep. 548, at page 579, it is said:

> "As we have said in our opinion in the case of *The Central Yellow Pine Association* v. *Illinois Central Railroad Company, et al.* (*ante*, 561), 'We deem it unecessary to express an opinion on this point, the enforcement of that act (Anti-Trust Act) being a matter properly cognizable by the courts.' "

Plaintiff entitled to jury trial.

It has been urged, however, that a jury cannot be permitted to pass on proper rates to be charged by carriers; that the Commission alone can pass on tariffs. This may be true generally speaking, but there is no inconsistency between giving to the Commission exclusive control over rate-making and allowing a court or jury to determine whether defendants in a proceeding under the Anti-Trust Act have violated Section 1 thereof and if so, the amount of the damage, if any, suffered by plaintiff under Section 7 of the Act. The jury may in some instances have to determine what increases were made by reason of the unlawful combination or conspiracy of defendants, but that has nothing to do with rate making.

It has been held that the jury may determine the reasonableness of the rate charged as an incident to determining the issues arising in a suit under Section 7 of the Anti-Trust Act.

Meeker v. *Lehigh Valley R. Co.*, 183 Fed. 551.

In an action under Section 7 the parties are entitled under the constitution to a jury trial.

Fleitmann v. *United Gas Improvement Co.*, 211 Fed. 103.

In *Thomsen* v. *Cayser*, 243 U. S. 66, this Court held that the unreasonableness of the rate and the extent thereof was properly submitted to the jury.

Even in actions under the Commerce Act against carriers for damages for collecting unreasonable rates where the money award of the Commission is introduced in evidence, the amount of damages is for the jury to determine.

> *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644.

The sole element of damages in such cases is the excess of charges collected over a reasonable rate, while suits under Section 7 of the Anti-Trust Act may involve other elements of damage.

The present action is not based, as erroneously assumed by the Court of Appeals, on injury from payment of approved rates, but on the violation of a statute giving a right of action for damages to any person who suffers injury by reason of the violation thereof. The cases cited in the opinion have no bearing on this case.

The Court of Appeals for the Second Circuit pointed out clearly the fallacy of the position of defendants in error in *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. 548. The District Court had held that no right of action for damages sustained by payment of unreasonable rates existed under the Anti-Trust Act. At page 551 the Court of Appeals said:

> "The defendant is not sued as a carrier, but as a *party to an unlawful conspiracy*. The unreasonableness of the railroad rate was only one of the means employed to make the conspiracy effective. The increase of the price at the mines was as essential to that result as the increase in the transportation charge. That the Interstate Commerce Act (Act Feb. 4, 1887, C. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154)) creates a tribunal to which shippers

must resort, primarily, for relief against excessive freight charges, is no reason why a person injured by an unlawful conspiracy cannot invoke the relief expressly granted by another and later Federal statute. *It might as well be claimed that the United States cannot proceed against a combination of railroad companies to fix rates until the reasonableness of such rates has been passed upon by the Interstate Commerce Commission.* Yet combinations of that nature were enjoined in the *Trans-Missouri Freight Association case,* 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in the *Joint Traffic Association case,* 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

It is true that the courts in determining as one of the elements of a conspiracy case the reasonableness of freight rates might pass upon the same question which would be presented to the Interstate Commerce Commission by a shipper proceeding under the act to regulate commerce. But the possibility of want of uniformity in decisions constitutes no ground for denying to an injured person a right of action granted by a statute of the United States separate and distinct from that act, however weighty such consideration might be in determining whether the common-law rights of a shipper and the right to demand damages given by the Interstate Commerce Act itself are subjected to its other provisions. Obviously the same possibility would exist in case of proceedings by the government to enjoin unlawful railroad combinations." (Italics ours.)

The ruling of the trial court as affirmed by the Court of Appeals deprived plaintiff of his right to a trial before a court and jury and made an order of an administrative board which expressly refused to determine the charge made by plaintiff for want of jurisdiction conclusive of his rights.

(B) Even if the increased rates were not unreasonably high, the defendants are liable if the rates were increased over competitive rates by the illegal combination.

One of the principal points made by counsel for defendants in error in the courts below was that plaintiff in error could not have suffered any pecuniary damage by paying a reasonable freight rate. This argument while plausible is unsound.

Defendants in error assume that the reasonable rate is the maximum rate that the Commerce Commission upon complaint would allow. They ignore the reasonable rate which competition naturally tends to bring about. The rates were increased in 1912 from 10 cents to 13½ cents a hundred pounds by the illegal acts of defendants. (Rec. 19-24, 37.) Yet counsel always refer to the increased rate as the reasonable rate instead of the lower rate which prevailed under natural and competitive conditions.

The lower courts fell into this same error.

The jury would be warranted in finding that the fair and reasonable rates were those established and prevailing for years under natural and competitive conditions. Such rates are comparable with the fair and open market price of commodities which prevails under natural conditions. The competitive or open market rate of 10 cents is therefore to be considered the reasonable rate, instead of the maximum rate of 13½ cents. The 10-cent rate prevailed from November, 1906, to September, 1912 (*Re Excelsior and Flax-Tow cases,* 36 I. C. C., p. 357.)

This is not a proceeding, as the court assumed, under Section 8 of the Commerce Act to recover excessive

freight charges collected by a carrier in violation of such act. In such cases the only right of recovery given by the statute is to the excess over what the Commission holds is the maximum reasonable rate to be charged, as empowered by Section 15 of the Commerce Act. For that reason it is held that resort must first be had to the Commission to determine the reasonableness of the rate and of the right to reparation, and its finding that the published rate does not exceed the "maximum rate to be charged" is conclusive. The action in such cases is against the particular carrier making the charge, while under Section 7 of the Anti-Trust Act each one of the conspirators is liable for the damages although it may not have collected a dollar from plaintiff for freight charges.

The issue here is not whether the defendants individually filed and collected an excessive rate. It is whether competing common carriers, who have combined contrary to Sections 1 and 2 of the Anti-Trust Act and fixed uniform and non-competitive rates higher than the prevailing competitive rates, are liable to persons having to pay such increased charges. In other words, does the fact that the increased rates put into effect as the result of the unlawful combination or conspiracy were not so excessive as to be condemned by the Interstate Commerce Commission, prevent a recovery by plaintiff? If the rate had been fixed by one carrier acting alone, and it was considered too high, the remedy must be sought under the Commerce Act. No question could arise in that case under the Anti-Trust Act. If, however, the rates complained of are the result of an unlawful combination as set forth in the declaration, the remedy is under the Anti-Trust Act and not the Commerce Act. In order to constitute a cause of action under Section 7 of the Anti-Trust Act, it is only necessary for plaintiff to al-

lege acts within the prohibiton of Sections 1 and 2 thereof, and that as a result of such acts he was "injured in his business or propery," and sustained damages.

The declaration sets forth such a cause of action. It alleges acts of the defendants which constitute a violation of Sections 1 and 2, and it then alleges that plaintiff suffered injury to his business and property, and specifically sets forth the damages. (Rec. 19-24, 28.) However, it is only necessary to allege damages generally.

The purpose of the Anti-Trust Act, as repeatedly declared by this Court, is to secure to the public the benefit of rates fixed under competitive conditions. This Court said, in the *Joint Traffic case* (171 U. S., p. 577):

> "The natural, direct and immediate effect of competition is, however, to lower rates * * *."

In speaking of the agreements in the *Trans-Missouri* and *Joint Traffic cases,* which were for the stated purposes of maintaining reasonable rates, the Court, in the *Joint Traffic case,* said (p. 565):

> "The natural and direct effect of the two agreements is the same viz., to maintain rates at a higher level than would otherwise prevail * * *."

It appears from the pleas of defendants that the Commission upheld certain of the advanced rates filed by the defendants "in so far as they did not represent advances over previously existing rates of more than 3½ cents per hundred pounds." (Rec. 37.) The declaration shows the increase from 10 cents to 13½ cents as the result of the unlawful agreement. This increase of 3½ cents a hundred pounds was the direct result of the illegal agreement. Except for the combination, plaintiff would have been charged 3½ cents a hundred pounds less than he was compelled to pay. It is utterly irrelevant whether

the Commission passed upon these rates. A reasonable rate cannot be fixed with mathematical certainty. As was said by the Commission in one of the reports set forth in the special pleas:

> "Manifestly the reasonableness of none of these rates is determinable by any absolute standard. The question in the case seems to be one of those that fall within that 'flexible limit of judgment' which the Supreme Court has said belongs to the power to fix rates. *A. C. L. R. R.* v. *N. C. Corp. Com.*, 206 U. S. 1, 26."
>
> *Re, Excelsior & Flax Tow Cases,* 36 I. C. C. 365.

The Commission, accordingly, in the so-called *Keogh Rate Cases,* merely refused to hold that 13½ cents exceeded the "maximum rate to be charged." In the same report it was said at page 364:

> "Many low rates have been established by carriers in times past because of competition or other circumstances, which often times have later ceased to exist."

In the case at bar, competition ceased to exist in 1912, and simultaneously the rates were increased about 35 per cent.

The Commission further states, on page 365, that it has no power to restrain carriers from increasing unduly low rates. The Anti-Trust Act, however, provides the authority to prevent such increase when it is the result of combination.

If, then, as a direct result of the unlawful agreements and acts of the defendants, set forth in the declaration, the freight rates which plaintiff had to pay in order to have his goods transported over defendants' lines were increased over the rates theretofore paid by him, it is clear that plaintiff was injured in his business and property and suffered damages by being charged the increased rates.

If this case had been tried, the Court or jury would not have been called upon to determine whether the increased rate was reasonable or not, but whether the increased rate was directly brought about by the unlawful conspiracy. The plaintiff would be entitled to recover the difference between the amount paid the defendants under the increased rate and the amount that would have been paid under the former or competitive rates. That difference is readily ascertainable. If plaintiff, under competitive conditions, could get his goods transported at a rate of 3½ cents a 100 pounds lower than a rate which the Interstate Commerce Commission might not hold unreasonable, and such rate is arbitrarily advanced by the defendants acting jointly and in violation of Section 1 of the Anti-Trust Act, as alleged in the declaration, why is not plaintiff's right to recover damages just as clear as it would be if the advanced rate were 3½ cents a 100 pounds higher than the Commission would uphold? We repeat that it is immaterial what the Commission has held or would hold in such case. Where a person is compelled to pay higher rates as the direct result of a criminal conspiracy in violation of Sections 1 and 2 of the Anti-Trust Act, he has suffered injury to his property or business within the meaning of Section 7 of the Act, regardless of any action by the Commerce Commission. It is a tort action, and the damages result from the defendants' wrong in committing the acts prohibited by the statute. The right of action is given by the same statute. It would be strange indeed if the right of action given by express statutory provision for the wrong done, could be defeated by the finding of an administrative board that the rates fixed did not exceed the "maximum to be charged," as provided under Section 15 of the Commerce Act.

Suppose no complaint had been filed with the Interstate Commerce Commission and no order or finding as to the rates had been made. Would the inquiry be confined to the reasonableness of the increased rate or to the extent of the increase caused by the conspiracy? Would the Court in its instructions to the jury limit the recovery to the amount paid in excess of a reasonable charge, or the amount paid in excess of the competitive rate previously charged and that would have prevailed but for the conspiracy? Clearly the measure of damages would be the charge in excess of the competitive rate. Under competitive conditions the rates might be unreasonably low, a situation Congress has persistently refused to empower the Commerce Commission to prevent, and if the carriers combined in violation of Sections 1 and 2 of the Anti-Trust Act and increased the rates to a reasonable basis, they would be liable for the excess over the competitive rate to any person charged the same. The damage is the direct result of the prohibited Acts.

In *Chattanooga Foundry Co.* v. *Atlanta,* 203 U. S. 390; 51 L. Ed. 241, this Court sustained a judgment awarding treble damages under Section 7 of the Anti-Trust Act. As the result of a combination in violation of Sections 1 and 2 of the Act, plaintiff, the City of Atlanta, paid higher prices for material for the construction of a system of water works than it would have had to pay but for such conspiracy. As stated in the opinion of this Court, the verdict was for "the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions, had the combination been out of the way, together with an attorney's fee." So, in the case at bar, plaintiff was entitled to recover the difference between the amount paid by him for freight charges under the increased rate and the amount that he would have had to pay under the

rate that would have prevailed "under natural conditions had the combination been out of the way." In the *Atlanta case* it may have been that the competitive prices prevailing before the combination were low—possibly lower than would produce a reasonable profit to the defendants, but nevertheless, the city was held to be entitled to the benefit of the competitive price, or what was there called the price prevailing under natural conditions. So, in this case, it matters not that the competitive rates prevailing before the conspiracy was carried out were lower than the maximum rates which the Interstate commerce Commission would have approved.

The question of damages arising under Section 7 of the Anti-Trust Act was considered by this Court in *Thomsen* v. *Cayser*, 243 U. S. 66; 61 L. Ed. 597. In discussing this question the Court said (p. 88, L. Ed. 607):

> "It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act, and the right to recover threefold the damages by him sustained. *The plaintiffs alleged a charge over a reasonable rate and the amount of it.* If the charge be true that more than a reasonable rate was secured by the combination, *the excess over what was reasonable was an element of injury. Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 51 L. Ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury, and the verdict represented their conclusion. * * *
>
> It is next contended that the jury was permitted to consider as elements of damage suppositious profits. The record does not sustain the contention. The profits were not left to speculation. There was different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury."

So in the case at bar the declaration alleges a charge of an excessive and unreasonable rate over what the competitive rate would have been and also that plaintiff lost large profits and his business was practically destroyed. (Rec. 26, 27.)

What the Court referred to as a reasonable rate is the rate that would have prevailed under competition and natural conditions.

It is evident that the damages resulting from such an illegal combination as in the case at bar, may not be confined to the amount paid by the shipper in excess of the competitive rates. If the freight charges were paid by the consignees, the shipper manifestly would not be entitled to recover such freight charges. However, the act of the carriers in increasing the rates might cause the shipper to lose customers, and in some cases practically destroy his business. He may have built an extensive plant at a certain place, relying upon competitive rates being maintained. If, then, all the carriers entering that point enter into an agreement to destroy competition in rate making and increase the rates to the maximum limits permitted by the Interstate Commerce Commission, he would be unable to carry on business at a profit and his plant would become practically worthless. That was the exact situation in the case at bar, as set forth in the declaration. The carriers having knowledge of the shipper's situation would be liable for such damages under the rule that tort feasors are liable for damages which they can reasonably anticipate as the natural and probable consequences of their tortious acts.

The Court of Appeals was in error in stating that the damages to plaintiff were confined to the increased freight charges paid by him. It is not necessary under common law pleading to allege damages specifically. A general allegation of damages was held sufficient in the *Cayser case, supra.* The damages resulting from the

unlawful acts of the defendants in error must be determined from the evidence on a trial, and not from the pleadings.

The District Court should have followed the *Cayser case* and submitted the question of damages to the jury instead of abdicating its function as a court because the Interstate Commerce Commission had found on the evidence submitted to it that the rates charged did not exceed a maximum rate permissible under the Commerce Act. It was urged by counsel for defendants in error that the verdicts of juries in such cases would vary greatly. That the decisions of the Commission do vary considerably is shown by the reports in the cases set up in the special pleas.

The report in the first case, which was against the *Chicago, Burlington & Quincy Railroad* alone, found that the rates as to excelsior were unreasonable and that plaintiff was entitled to reparation. 24 I. C. C., p. 608.

In the second case, known as the *Suspension cases,* reported in 26 I. C. C., p. 694, the Commission criticized some of the rates as utterly inconsistent and lacking in unity, but on a later hearing the Commission modified its criticism of the rates, stating, however, that the criticism was justified on the evidence then before it, "particularly in view of the respondents' somewhat indifferent presentation of the evidence and the relatively greater stress which was laid upon the St. Paul-Chicago rate by all parties." 36 I. C. C., p. 356.

Counsel for defendants in error have repeatedly asserted that the Commission fixed the rates and under the law they had to collect the rates complained of in the declaration, and the Court of Appeals in its opinion refers to such rates as compulsory on the part of the plaintiff to pay, and the defendants to collect. We have heretofore pointed out, however, that the defendants

fixed the rates, and the Commission merely held that the rates filed did not exceed a maximum reasonable rate within the Commerce Act.

It is true, of course, that the defendants must collect the published tariffs, and this is so even when the rates are excessive and unreasonable, and are on complaint so held by the Commission.

The complaint is not that published rates were collected, but that the defendants conspired to increase the prevailing competitive rates. The declaration alleges that the publishing of such rates was a part of the conspiracy. (Rec. 6.) The defendants violated the law by fixing collusive rates instead of competitive rates. The Anti-Trust Act, as stated by this Court in the *Thomsen-Cayser case, supra,* required them to compete, not combine. They did the very opposite. They agreed to eliminate competition and increase the rates to such a point as in their joint judgment would not exceed the maximum rates which the Commission would permit. Having entered into the conspiracy, the defendants, in furtherance thereof, and to make the scheme effective, separately filed and published the rates thus unlawfully agreed upon. They now plead as a ground for immunity the requirement of the Commerce Act that they must not depart from the published tariffs!

In the *Thomsen-Cayser case* (243 U. S., p. 85) this Court said that the statute was sufficiently adequate to "prevent evasions of the policy of the law 'by resort to any disguise or subterfuge of form,' or the escape of its prohibition 'by any indirection.'"

This same immunity plea was made in the *Joint Traffic case.*

In that case, the agreement recited that one of its objects was to fix reasonable and just rates and to cooperate with the Interstate Commerce Commission. It

appeared that the rates adopted were the rates which had been previously fixed by each company itself and filed with the Interstate Commerce Commission. The contention though presented ably by eminent counsel, was held by this court to be without merit.

If, as appears under the decisions of the Supreme Court in the *Joint Traffic* and other cases, common carriers who enter into such unlawful combinations may be enjoined in equity or proceeded against criminally, or their officers imprisoned, it would seem reasonable that such carriers should be held for the damages caused to individuals by reason of their criminal acts. The whole argument of defendants in error runs counter to the reasoning of the Supreme Court in the *Trans-Missouri* and *Joint Traffic cases* and many subsequent decisions. The wrong of defendants consisted in entering into the conspiracy and fixing and charging rates in pursuance thereof in violation of the positive prohibition of the Anti-Trust Act. It is no answer to this charge to say that each defendant thereafter filed the higher rates thus unlawfully agreed upon with the Interstate Commerce Commission and that it later held such rates were not unreasonable within the meaning of the Commerce Act.

We respectfully submit that the judgments of the District Court and the Circuit Court of Appeals are erroneous and should be reversed and the cause remanded to the District Court with instructions to sustain the demurrers to the special pleas of defendants.

Respectfully submitted,

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Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 269 51

JOHN W. KEOGH,
Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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Chicago, Illinois, April 12, 1922.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

Index of Statutes and Decisions.

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Statement of the Case.

This is a suit for private, pecuniary damages, under Section 7 of the Sherman Anti-Trust Law. The basis of the cause of action is specific, pecuniary injury to plaintiff. The declaration alleges that plaintiff sustained such pecuniary injury from the payment of "uniform, arbitrary, noncompetitive and unreasonable freight rates."

The alleged unreasonable freight rates, which plaintiff claimed were the cause of his pecuniary injury, in fact were the duly published rates, filed by the carriers as required by the Interstate Commerce Act, after each of said rates had been investigated by the Interstate Commerce Commission on complaint of plaintiff and his competitors and found reasonable, nondiscriminatory and otherwise lawful under the Interstate Commerce Act.

In its last analysis plaintiff's case stands on the proposition that he could sustain damages, under the Sherman Anti-Trust Law, by the payment of freight charges approved by the Interstate Commerce Commission and required to be paid by the Interstate Commerce Act; that rates may be reasonable and nondiscriminatory under the Interstate Commerce Act but nevertheless be unreasonable and the cause of damage under the Sherman Anti-Trust Law; that after the Interstate Commerce Commission has determined what rates are reasonable and nondiscriminatory, the jury in a suit like this may pass upon the propriety of the same rates.

Plaintiff would have the jury guess away the published tariffs and establish his freight charges on mere speculation. Of course legal damages cannot be computed in that way. The fundamental difficulty is that no court or jury can say what interstate freight rates might have been, or should have been. Congress has fixed a single standard—the published tariffs. They have the binding force of a statute and the Interstate Commerce Commission alone has the power to relieve shippers and carriers therefrom.

The rates plaintiff paid not only were reasonable but they were *the only rates* lawfully applicable. No other or different rates can be applied. It was not defend-

ants who required plaintiff to pay these rates; it was the law.

If plaintiff actually had sustained injury from the exaction of unreasonable freight charges, he was not without remedy. Congress has clothed the Interstate Commerce Commission with exclusive power to make findings upon which all damages sustained because of the payment of such rates may be recovered. Plaintiff's repeated complaints to the Commission about these very rates received patient attention and careful investigation. Its judgments must be taken as final and conclusive in this case.

The Keogh Rate Cases.

December 29, 1911, plaintiff filed complaint with the Interstate Commerce Commission, against the Chicago, Burlington & Quincy Railroad Company, alleging that rates on excelsior from St. Paul to Chicago and Missouri River points were unreasonable to the extent that they exceeded rates contemporaneously in force on flax tow. For many years the rates to Chicago had been 10 cents per hundred pounds on flax tow and 13½ cents on excelsior. Differences also had existed between rates on the two commodities to the Missouri River. The Commission found that excelsior and flax tow were analogous in character from a transportation standpoint, and that there was no justification for the differences in rates, and on June 12, 1912, ordered the railroad to establish excelsior rates not in excess of flax tow rates. (First Keogh case, *Keogh* v. *C. B. & Q. R. R. Co.* 24 I. C. C. 606.)

This order might have been complied with either by reducing excelsior rates or increasing tow rates. (36 I. C. C. 349.) On September 15, 1912, the railroad

company filed tariffs reducing the excelsior rates to the flax tow basis. All other carriers between the points in question filed similar reductions.

The immediate effect of these reductions is described by the Commission in a later report, *The Excelsior and Flax Tow Cases*, 36 I. C. C. 349 at 351:

> "The reduction of the excelsior rates from the Twin Cities disturbed a relationship of rates which had existed for several years and incidentally led to the filing of a complaint on November 18, 1912, by the Morris-Johnson-Brown Manufacturing Company, of Dubuque, Iowa, alleging that the rates from Dubuque, Iowa, to Chicago, Peoria, St. Louis and Missouri River cities, exclusive of Sioux City, were unreasonable and unduly discriminatory as compared with the rates from the Twin Cities to the same destinations."

These vigorous demands of other producers for relief against the disrupted adjustment led to an examination of the rate structure by all carriers interested in the traffic. It was finally sought to cure the situation by restoring the excelsior rate from the Twin Cities to its original level and by increasing the flax tow rate to the same level. In this way the carriers proposed to remove the discrimination which Mr. Keogh had complained of in his first case, and at the same time to satisfy the complaints of discrimination which other producers had made because of the disruption in the general adjustment caused by the reduction in the excelsior rate from the Twin Cities. In the publication of these tariffs, the carriers acted through a joint agent, Mr. W. H. Hosmer, chairman of the Western Trunk Line Committee, which they had been specifically authorized to do by the Interstate Commerce Commission in the interest of uniformity and simplicity of tariff publication. *Tariff Circular* 18-*A*, *Interstate Commerce Commission*, Rules 13 and 17, effective March 31, 1911.

This publication by a joint agent, duly authorized to act by the Commission, is all there is to the point upon which plaintiff in error relies on page 35 of his brief that the carriers themselves never filed the tariffs. The fact is that they did file them through the agency approved by law, and the filing by the carriers was alleged in the special pleas and admitted by plaintiff's demurrer.

The tariffs by which the carriers sought to accomplish this general cure-all were filed with the Interstate Commerce Commission on various dates up to December 1, 1912, effective upon thirty days' notice. Upon being advised of the publication of these tariffs Mr. Keogh immediately protested to the Interstate Commerce Commission, which, in conformity with Section 15 of the Interstate Commerce Act, suspended the operation of the proposed tariffs and entered upon a hearing "concerning the propriety and reasonableness of such rates." This hearing became the second Keogh case, *Rates on Excelsior and Flax Tow from St. Paul, Minn.*, 26 I. C. C. ~~659~~ 689, and was not decided until ~~May 5,~~ 1913. During the interim the tariffs of September 15, 1912, reducing the excelsior rates from the Twin Cities to the tow basis remained in force. During that period the plaintiff had the benefit of the reduction of the Chicago excelsior rate from 13½ to 10 cents, and a corresponding reduction in the rates from St. Paul to the Missouri River cities, which were the rate reductions the Commission later found caused unjust discrimination against his competitors. (30 I. C. C. 443.) 36 Ice. 351, 366.

In the second Keogh case (26 I. C. C. ~~659~~ 689), full hearing was had before the Commission, in which, under the statute, the burden of proof was on the carriers to justify the restoration of the excelsior rates and increase of the tow rates as proposed in the

suspended tariffs. The carriers introduced evidence showing the nature and relative cost of the traffic, and other facts and circumstances which might properly be considered by the Commission in a rate investigation. Mr. Keogh appeared in person and by counsel, and by evidence and argument, endeavored to convince the Commission that the proposed restoration of excelsior rates and increase of tow rates would be unreasonable and unjust. Among other things, Mr. Keogh argued that the proposed rates were the result of a combination or agreement among the carriers, in violation of the Anti-Trust Law, and that such facts were competent evidence that the same would be unreasonable. The Commission said that the record justified an inference that the proposed rates were the result of a common understanding, no doubt prompted by the alternative nature of the order in the first Keogh case, but notwithstanding this evidence of common effort on the part of the carriers to increase the rates contemporaneously, which the Commission held was admissible as bearing upon the reasonableness of the proposed rates, the Commission decided that the carriers had justified the proposed increases of the tow rates from 10 cents to 13½ cents, and the proposed restoration of the excelsior rates to 13½ cents from St. Paul to Chicago, and entered an order approving same, applicable by all lines. (*Rates on Excelsior and Flax Tow from St. Paul Minn.* 26 I. C. C. ~~659~~. 689)

The Commission did not approve the proposed schedule of rates from St. Paul to Missouri River points, but directed the carriers to submit a readjustment thereof under which none of said rates should be increased more than 3½ cents per hundred pounds, nor increased any amount whatever unless the increases were justified by the carriers. Thereupon, May 5, 1913, by opera-

tion of law, the lawful rate on excelsior from St. Paul to Chicago, became 13½ cents per hundred pounds, the same as it had been prior to September 15, 1912, and the rate on flax tow between the same points became 13½ cents per hundred pounds. It was the excelsior rate in which Mr. Keogh was particularly interested. The argument of counsel for plaintiff in error in this court is directed particularly against what they call the "increase from 10 cents to 13½ cents." In reality, it was a restoration of the original 13½-cent rate.

Mr. Keogh filed a petition for rehearing, which was denied by the Commission, June 5, 1913.

Pursuant to the Commission's direction, all the carriers filed tariffs ~~April 4, 1913,~~ readjusting rates on excelsior and tow from St. Paul to the Missouri River. Prior to September 15, 1912, the rates from St. Paul to Kansas City and Omaha had been 22 cents per hundred pounds for excelsior and 14 cents for flax tow. Under the readjustment of April 4, 1913, the rates on both commodities from St. Paul to Kansas City and Omaha became 17½ cents, ~~a reduction of 1½ cents on excelsior~~, and an increase of 2½ cents on flax tow. Other Missouri River rates were readjusted on the same basis. The Commission approved the readjustment on the lines of all carriers.

Mr. Keogh filed a second petition for rehearing, which was granted by the Commission July 24, 1913, and the cases were reopened for the purpose of determining the minimum carload weights of excelsior and flax tow on which the new rates applied. The flax tow minimum had been 30,000 pounds and the excelsior minimum 20,000 pounds. The schedules effective May 5, 1913, reduced the flax tow minimum to 24,000 pounds. A full hearing was had on this matter (third Keogh case,

Rates on Excelsior and Flax Tow from St. Paul, Minn. 29 I. C. C. 640), and on March 2, 1914, the Commission rendered a report finding that the minimum weight of 20,000 pounds on excelsior was reasonably adapted to the purposes of the carriers and the great majority of shippers and that it should not be increased because one shipper, Mr. Keogh, was in a position to load cars more heavily than his competitors. In this case Mr. Keogh also endeavored to persuade the Commission to prescribe a lower rate applicable to a 30,000-pound minimum load of excelsior than applied to a 20,000 pound minimum, but this application was denied by the Commission.

Shortly after this the Commission decided the complaint of the Dubuque shippers, previously referred to, which had been filed on November 18, 1912. This was the complaint of competing producers that the temporary reduction in the excelsior rate from the Twin Cities had discriminated unjustly against them. On May 5, 1914, the Commission rendered its report and order, *Morris-Johnson-Brown Mfg. Co.* v. *I. C. R. R. Co.* 30 I. C. C. 443. It found that with the restoration by all carriers of the 13½-cent rate on excelsior and flax tow from the Twin Cities to Chicago, no unjust discrimination existed against Dubuque, but that certain readjustment was necessary from Dubuque to the Missouri River cities. In other words, the Commission again gave its stamp of approval to the efforts of the carriers to remove the unjust discriminations which the 1912 reduction in the excelsior rate from the Twin Cities had created.

Immediately Mr. Keogh again appealed to the Interstate Commerce Commission for relief, asserting in informal complaints that the rates which the carriers had filed purporting to comply with the finding in the

second Keogh case (26 I. C. C. 689) were in fact unreasonable and unduly prejudicial (36 I. C. C. 349 at 352). On July 29, 1914, the Commission acted on these complaints by ordering the previous Keogh cases reopened, and by reopening the Dubuque case and consolidating them all for rehearing. Thus arose the fourth Keogh case, decided November 2, 1915. (*The Excelsior and Flax Tow Cases*, 36 I. C. C. 349.)

The Commission re-examined the entire subject and all evidence applicable to the transportation service rendered, analyzed the rates, the per car, per car mile and per ton mile receipts, compared same with rates on other commodities and made a comprehensive study and report on the general character of the commodities, the methods of shipping and loading, the value and volume of the tonnage, equipment required, empty haul to supply equipment, and other criteria bearing on the question. Mr. Keogh again made the charge that the carriers had unlawfully conspired to raise rates in violation of the Anti-Trust Act and in response to a demand of the Commission the carriers produced and filed all memoranda, letters, notices, and circulars in connection with the rates in question. The Commission repeated its statement that the records justified an inference that the rates were increased as the result of a common understanding and held that while evidence of concert of action among carriers would be taken into consideration by the Commission upon the issue of reasonableness of the rates, yet such evidence was not alone conclusive that the rates were unreasonable; that prior to 1912, excelsior had taken the same rate as hay, while the present rates on excelsior and tow were much lower than hay rates recently approved by the Commission, although the commodities were much the same

from a transportation standpoint. In summing up the case the Commission said at page 366:

> "Whatever factors may properly be considered in passing upon the reasonableness of rates, the question cannot be determined apart from a consideration of the revenue which those rates yield. In this case the revenue on flax tow and excelsior under the present rates is materially below that earned on many other commodities with which comparison is made and which moved in regular course from the Twin Cities to the destinations involved. The disparity is the more striking when we consider the matter of equipment, the lesser volume of traffic and the light loading per car. * * *
>
> We are of the opinion, from consideration of the facts and circumstances now appearing of record, that respondents have justified the following rates, subject to a 20,000-pound minimum, and Rule No. 6-B of the Western Classification, which rates and minimum weights we find to be reasonable and nondiscriminatory, and which they may establish upon not less than statutory notice, viz., from St. Paul, Minneapolis and Minnesota Transfer to Sioux City, 17 cents per hundred pounds; to Omaha and other Missouri River cities to and including Kansas City, 20 cents per hundred pounds; from Dubuque, Iowa, to Missouri River cities, Omaha to Kansas City, inclusive, 17 cents per hundred pounds." (36 I. C. C. 349, at 366.)

Plaintiff's grievances against the rates in question were considered four different times by the Interstate Commerce Commission. During the entire period covered by the declaration, plaintiff never paid one cent of freight charges on rates which had not been theretofore specifically approved and found reasonable and nondiscriminatory by the Commission. Having availed himself of every known method provided by the law and the liberal procedure of the Commission for investigating and testing the legality of these rates, and after having obtained the judgment of the Interstate Com-

merce Commission that the rates were reasonable and nondiscriminatory, plaintiff brought this suit in court, claiming that the jury could assess damages by deducting something from the lawful rates thus approved by the Interstate Commerce Commission.

By stipulation (Rec., 50; Tr. 41) the proceedings in the Keogh rate cases before the Interstate Commerce Commission to which we have referred were incorporated in the special pleas to which plaintiff in error demurred. The trial court overruled the demurrer; plaintiff elected to stand by same; judgment was entered for defendants; on writ of error the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment, 271 Fed. 444; and the suit is here on plaintiff's writ of error, his petition for certiorari having been denied.

Specification of Errors.

The specification of errors appearing on page 9 of plaintiff's brief makes reference to a number of so-called "holdings" which counsel ascribed to the lower courts. These may give the impression that the District Court made specific rulings on the points specified as errors. The court did no more than overrule plaintiff's demurrer to the stipulated special pleas and, on plaintiff's refusal to plead further, entered judgment for defendants. The so-called "holdings" are merely counsel's ideas of the court's reasons for overruling the demurrer. Of course it is the judgment, and not the reasons for it, in which this court is interested, but it is hardly fair to the lower courts to inject so-called "holdings" into the case when there were no such holdings in the record.

If there is to be argument in this court as to the reason why the demurrer was overruled, our contention is

that it was overruled because this particular suit for private damages could not be maintained in view of the fact that all the rates alleged to have caused the damages were lawful rates under the Interstate Commerce Act, and being lawful under that statute, they could not be unlawful, or the cause of damage, under any other statute.

BRIEF OF ARGUMENT.

THIS SUIT FOR PRIVATE DAMAGES UNDER SECTION SEVEN OF THE SHERMAN ANTI-TRUST LAW, CANNOT BE MAINTAINED BECAUSE THE PECUNIARY DAMAGE IS CLAIMED TO HAVE RESULTED FROM PAYMENT OF INTERSTATE FREIGHT RATES WHICH HAD BEEN FOUND REASONABLE AND NONDISCRIMINATORY BY THE INTERSTATE COMMERCE COMMISSION. INTERSTATE FREIGHT RATES, LAWFUL UNDER THE INTERSTATE COMMERCE ACT, CANNOT CAUSE DAMAGE.

I.

Pecuniary Damage to Plaintiff Is the Essential Element of the Case.

Section 7 of the Sherman Anti-Trust Law, on which this suit is brought, provides:

> "*Any person who shall be injured in his business or property* by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages *by him sustained*, and the costs of suit including a reasonable attorney's fee." (Italics ours.)

From acts of common carriers which might furnish a basis for action by the Government, a cause of action does not necessarily arise to an individual under Section 7.

Injury to the general public—to all the people alike—

by violation of the Anti-Trust Act may be prosecuted criminally (Secs. 1, 2 and 3), may be restrained (Sec. 4), or penalized by forfeiture (Sec. 6). But plaintiff's cause of action is based on specific pecuniary damages *to him,* and to make a case he must show not merely an unlawful conspiracy by defendants, but that same operated *to his private damage.* Public wrong or violation of a criminal statute does not necessarily cause private damage.

It is only when private damage is sustained that Section 7 gives the injured individual a right of action.

Motion Picture Patents Co. v. *Eclair Film Co.,* 208 Fed. 416.

Locker v. *American Tobacco Co.,* 218 Fed. 447.

Correy v. *Boston Ice Co.* 207 Fed. 465.

Noyes v. *Parsons,* 245 Fed. 689.

Central Coal & Coke Co. v. *Hartman,* 111 Fed. 96.

In *American Sea Green Slate Company* v. *O'Halloran,* 229 Fed. 77, at page 79, Judge Lacombe said:

> "To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain. As we understand the law a jury may not merely guess that plaintiff lost $1,000 or $10,000 which they might have made, even if they feel reasonably sure that some loss was sustained. They cannot award damage as they do for pain or suffering in an action for personal injuries, or for reputation as they do in a libel suit."

In *Pennsylvania Railroad Company* v. *International Coal Company,* 230 U. S. 184, page 204, this court said:

> "It is elementary that in a suit at law both *the fact* and the amount of damage must be proved."

And at page 206 it was said:

> "This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In *Knudsen* v. *Michigan Central R. R.* 148 Fed. Rep. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission.' A similar principle was applied in *Meeker* v. *Lehigh Valley R. R.* 183 Fed. Rep. 548, 550, and in *Central Coal Company* v. *Hartman,* 111 Fed. 96, where the suit was to recover damages caused by a violation of the Anti-Trust Act."

Plaintiff devotes a large part of his brief to discussion of dissolution suits by the Government under Secs. 1 and 2 of the Sherman Law (*Trans-Missouri Case, Joint Traffic Case, etc.*). In those cases, brought for protection of the general public interest, there was no question of damages. In this case private pecuniary injury to plaintiff is the basis of the action. Plaintiff alleges such pecuniary injury to him *from the rates.* If they did not damage him, he has no right of action under Section 7. The lower courts have held that he could not be damaged by payment of lawful rates, duly approved by the Interstate Commerce Commission, and that is the issue now before this court.

On a proper occasion it might be interesting to follow counsel in their discussion of the various decisions of this court construing Sections 1 and 2 of the Sherman

Anti-Trust Law, but for the purposes of this case, on the issue here presented, the only pertinent point under the Anti-Trust Law is that the right of action given by Section 7 depends upon private, pecuniary injury to plaintiff. On the question of what private damages plaintiff claimed to have sustained, the lower courts concluded that the controlling statute was the Interstate Commerce Act.

II.

It Is the Interstate Commerce Act, and Not the Sherman Anti-Trust Law, Which Fixes the Standard of Legality for Interstate Freight Rates as Between Shippers and Carriers.

The Interstate Commerce Act provides that rates must be just, reasonable, and nondiscriminatory. There can be no other standard as between the carriers and the shippers. The theory of plaintiff's case is he was entitled to some other rate than the rates found reasonable and nondiscriminatory under the Interstate Commerce Act. Whatever may have been said by this court in the Government suits under Sections 1 and 2 of the Anti-Trust Act about the duty of the carriers to compete and not combine, or about the effect of competition on rates, this court never has held that an individual, claiming private damages under Section 7 of the Anti-Trust Act, might establish such damages merely by showing that the interstate freight rates he paid were noncompetitive, or might recover as such damages, supposed differences between competitive and noncompetitive interstate rates. The case of *Thomsen* v. *Cayser*, 243 U. S. 66, strongly relied upon by plaintiff, was an action against carriers engaged solely in ocean traffic between the United States and nonadjacent foreign countries. As

such carriers are not subject to the Interstate Commerce Act or the jurisdiction of the Interstate Commerce Commission (Interstate Commerce Act, Section 1; *Pacific Mail Steamship Co.* v. *Western Pacific R. R. Co.* 251 Federal, 218), the decision in *Thomsen* v. *Cayser* is not applicable to this case.

Wherever the Interstate Commerce Act applies, of necessity it controls. Interstate freight rates found to be legal when tested by the standards prescribed in the Interstate Commerce Act, are not to be outlawed by or under any other statute. Rates valid under the Interstate Commerce Act are valid for all purposes. Under the Interstate Commerce Act reasonable, nondiscriminatory rates are lawful rates, and a shipper who has been accorded such lawful rates has sustained no damage. He cannot recover back any part of such lawful rates on the ground that they are noncompetitive. If Mr. Keogh is right the laborious efforts of the Interstate Commerce Commission in its series of decisions to build a nondiscriminatory rate structure in an entire territory are completely nullified. If he is right, the protection against undue preference which the Dubuque shippers sought and secured is lost to them. If he is right, a jury may give him the lower rate which the carriers could not give him without violating Section 3 of the Interstate Commerce Act.

What, under such a theory, becomes of the basic principle that shippers must be given uniformity of treatment by a strict enforcement of published rates? What becomes of the doctrine that published rates may be set aside only by the single administrative tribunal that Congress has set up to deal with them according to specified standards definitely prescribed by law? What becomes of the requirement of the Elkins Act that no individual may secure a rebate or concession

from the published rate, either before or after the event? And what becomes of the *Abilene Oil Case* and the other leading decisions of this court by which the fundamental purposes of the Interstate Commerce Act have been vitalized and expounded? In a word, what becomes of the very tests of propriety which Congress has set up—reasonableness and absence of unjust discrimination—when every jury in the land may exercise its judgment as to what rate the individual shipper should have paid?

III.

The Interstate Commerce Commission Has Exclusive Jurisdiction to Determine Whether or Not Freight Rates Are Reasonable and Nondiscriminatory and Such Questions Are Not Open for the Consideration of Courts or Juries.

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

Baltimore & Ohio R. R. Co. v. *United States ex rel. Pitcairn Coal Company*, 215 U. S. 481.

Robinson v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506.

Mitchell Coal & Coke Co. v. *Pennsylvania R. R. Co.*, 230 U. S. 247.

Morrisdale Coal Company v. *Pennsylvania R. R. Co.*, 230 U. S. 304.

Texas & Pacific Ry. Co. v. *American Tie & Timber Co.*, 234 U. S. 138.

Loomis, et al. v. *Lehigh Valley R. R. Co.* 240 U. S. 43.

The Findings of the Interstate Commerce Commission That These Rates Were Reasonable and Nondiscriminatory Cannot Be Reviewed in This Suit.

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Proctor & Gamble Co. v. *United States*, 225 U. S. 282.

Kansas City Southern Ry. Co. v. *United States*, 231 U. S. 423.

Interstate Commerce Commission v. *Atchison, Topeka & Santa Fe Ry. Co.* (Los Angeles Switching Case), 234 U. S. 294.

Pennsylvania Company v. *United States*, 236 U. S. 351.

Manufacturers Railway v. *United States*, 246 U. S. 457.

It is established by a long line of decisions of this court that the Interstate Commerce Commission has exclusive jurisdiction over freight rates and that it alone —not courts or juries—has the power to determine whether or not rates are reasonable and nondiscriminatory. The plaintiff's argument is that this power of the Commission is limited to actual rate making, that the effect of the Commission's findings does not extend beyond proceedings under the Commerce Act, and that because this suit is under the Sherman Law the jury was free to determine whether or not the rates approved by the Commission were in fact proper; that the same rates found reasonable, nondiscriminatory and valid by the Interstate Commerce Commission might nevertheless be found by a jury to be the cause of damage.

The theory of plaintiff's case is that an award of dam-

ages by the courts in cases of this character would in no way conflict with the Interstate Commerce Act or the powers of the Commission. Congress has clothed the Commission not only with the power to determine what rates are unreasonable and discriminatory, but with the further power to execute and enforce the provisions of the Interstate Commerce Act, the primary purpose of which was to prevent discrimination. The decision of this court in the *Abilene Oil Case* has settled that the prohibitions of the Commerce Act against preferences and discriminations are linked with the establishment and maintenance of rates, that if courts and juries were at liberty to adjudicate the reasonableness of rates, standards would fluctuate accordingly, discriminations would result and the enforcement of the Commerce Act would be rendered impossible.

At page 30 of plaintiff's brief, counsel quote Section 22 of the Interstate Commerce Act, and argue that said section preserves all rights which plaintiff may have under other laws. In the *Abilene Oil Case* this court said that Section 22, if construed as claimed by plaintiff here, would destroy the Interstate Commerce Act.

IV.

The Interstate Commerce Commission Alone Has the Power to Relieve a Shipper from the Binding Force of the Published Tariffs and to Make Findings Upon Which the Shipper May Recover All Damages Occasioned by Illegal Rates.

The statutory obligation to pay and collect the published rates is absolute.

Pennsylvania R. R. Co. v. *International Coal Company,* 230 U. S. 184.

The schedules of rates filed pursuant to the Interstate Commerce Act cannot be varied or departed from under any pretext.

A. T. & S. F. R. R. Co. v. *Robinson,* 233 U. S. 173.

Louisville & Nashville Ry. Co. v. *Maxwell,* 237 U. S. 94.

Dayton Coal & Iron Company v. *C. N. O. & T. Ry. Co.,* 239 U. S. 446.

Erie Railroad Company v. *Stone,* 244 U. S. 332.

In *Pennsylvania R. R. Co.* v. *International Coal Company, supra,* at page 196, the court said:

> "The tariff, so long as it was of force, was in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The defendants were bound to charge and collect, and the plaintiff was bound to pay, the rates which actually were charged and paid. Without recourse to the Interstate Commerce Commission, an action cannot be maintained by one, to recover from the other, damages claimed to have been sustained because of the payment of rates required by the law to be made.

A court is not the proper tribunal to set aside, modify, or annul the tariff rates of a carrier. The Interstate Commerce Commission has exclusive power to do that. Courts cannot indirectly relieve shippers from the controlling effect of the tariff rates by permitting recoveries of any portion thereof or, what is equivalent thereto, damages because of the payment.

Sections 8, 9 and 16 of the Interstate Commerce Act

confer on the Interstate Commerce Commission full power to award shippers all damages sustained by reason of the collection of improper freight charges.

Louisville & Nashville Railroad Co. v. *Ohio Valley Tie Company,* 242 U. S. 288, was an action for damages under the anti-trust statutes of the State of Kentucky, which statutes are similar to the Sherman Act. In that case there had been an award of reparation by the Interstate Commerce Commission. The court held under Sections 8, 9 and 16 of the Act to Regulate Commerce, all damages properly attributable to the exaction of excessive rates by carriers in interstate commerce may be awarded in a proceeding before the Interstate Commerce Commission, and when damages because of such rates have been awarded, and satisfied, further damages resulting from the same cause may not be recovered through independent proceedings in court. At page 291, referring to the Commerce Act, the court said:

> "The decisions say that whatever the damages were they could be recovered (*Pennsylvania R. R. Co.* v. *International Coal Min. Co.* 230 U. S. 184, 202, 203; *Meeker* v. *Lehigh Valley R. R. Company,* 236 U. S. 412, 429); and that the statute determines the extent of damages. (*Pennsylvania R. R. Co.* v. *Clark Bros. Coal Min. Co.* 238 U. S. 456, 472.) We are of the opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause must be taken to have been considered in the award of the Commission and compensated when that award was paid."

The Commerce Act provides complete remedies for all damages plaintiff might have sustained through unreasonable or improper freight charges. The statutory condition precedent to recovery of such damages is a finding by the Commission that the rates were unreasonable.

On complaint of plaintiff, the Commission investigated every rate involved in this case. Before any rate was collected from plaintiff it had been approved by the Commission. Such approval by the Commission was an absolute bar to any claim for damages. Obviously plaintiff could get no award from the Commission under the Commerce Act. As that statute fixes rights and liabilities of shippers and carriers in interstate commerce, the remedies therein provided by Congress for injuries arising from collection of the tariff rates are exclusive. Any other conclusion would be utterly incompatible with the principles of uniformity on which the statute is based. Plaintiff claims damages from the collection of the published rates. As those rates had been duly approved by the Commission, he had no right to damages under the Commerce Act. Plaintiff cannot use the Sherman Law to recover freight rate damage, when under the Commerce Act there has been no damage. This suit seeks to override the judgments of the Interstate Commerce Commission; it completely ignores the Commerce Act and is in plain disregard of it. If it could be maintained, the force of the Commerce Act would be destroyed.

There is no case like this one in the books; it is a suit unheard of until now. There are cases where shippers have made unsuccessful attempts to recover, under the Sherman Law, damages for payment of the published rates, but there is no case in which a shipper has attempted to maintain an action based on alleged pecuniary injury from payment of rates declared reasonable and proper by the Interstate Commerce Commission.

In *American Union Coal Co.* v. *Penna. R. R. Co.* 159 Fed. 279, an action was brought under the Sherman Law for treble damages alleged to have been sustained be-

cause defendant railroad and others combined to transport coal of plaintiff's competitors at less than the regular tariff rates, which plaintiff was required to pay. In sustaining defendant's demurrer to the declaration, Judge Holland said:

> "The plaintiff, however, alleges a combination or conspiracy on the part of the defendant with certain other railroads to restrain trade, which combination, etc., is effected by charging the plaintiff the tariff rates and charging its competitors less than the tariff rates. This difference in charge per ton is laid as the damage suffered by plaintiff, and treble the amount is claimed under the Sherman Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); that is to say: The first count attempts to lay a cause of action under the Sherman Anti-Trust Act by alleging a combination and conspiracy of the defendant with other railroads, but the facts averred in the statement do not set forth a combination or conspiracy to restrain trade, and the damage claimed is for an injury for which damage can be collected only under the Interstate Commerce Act, Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), to wit, by unlawful discrimination against plaintiff in collecting tariff rates from it and by rebates and other devices permitting its competitors to transport their coal for less per ton. The second count claims treble damages under the Sherman Anti-Trust Act for an 'excessive and unreasonable charge' of 55 cents per ton for certain number of tons of coal transported by the defendant company for the plaintiff at tariff rates. The third count is a claim for treble damages under the Sherman Anti-Trust Act for a charge for the transportation of plaintiff's coal over the defendant's road in excess of the lawful charge for the carriage of said coal, the price charged being the amount specified in the defendant's tariff of rates posted and filed with the Interstate Commerce Commission.
>
> The ground of demurrer is the same to each of the three counts, to wit, that there are no averments

of fact in any of the three counts showing an injury under the Sherman Anti-Trust Act of July 2, 1890. In this we think the defendant is right."

In referring to the second and third counts, the court noted that it appeared the amounts charged by the defendant were at the tariff rates, posted and filed with the Interstate Commerce Commission as required by law, and said:

> "If the plaintiff regarded these charges 'unreasonable,' as set forth in the second count, or 'unlawful,' as alleged in the third count, its remedy was to apply to the Interstate Commerce Commission and have the schedule of tariffs adjusted on a 'reasonable' and 'lawful' basis. There is no right of action either under the Anti-Trust Act or the Interstate Commerce Act for a readjustment of tariff rates filed and posted other than through the Interstate Commerce Commission. A shipper cannot maintain an action at law for excessive and unreasonable freight rates exacted on interstate shipments, where the rates charged were those which had been duly filed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission. *Texas & Pacific R. R. Co.* v. *Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Clement* v. *Louisville & N. R. R. Co.* 153 Fed. 979."

Meeker et al. v. *Lehigh Valley R. R. Co. et al.* 162 Fed. 354, was a suit under the Sherman Law to recover damages alleged to have been sustained due to a conspiracy of defendants to raise transportation charges on anthracite coal, whereby plaintiffs were obliged to pay excessive and unlawful rates. It was held that Congress having established the Interstate Commerce Commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable, and what are illegal and excessive, no action could be maintained in court unless

the complaint alleged that resort had been had to the Interstate Commerce Commission, and the rate charged and paid declared excessive or unreasonable; that in an action under the Sherman Law for alleged damages due to combination or conspiracy between interstate railroads, an allegation that plaintiff's loss resulted from being obliged to pay "unlawful rates," did not amount to an allegation that the rates charged had been declared unlawful by the Commission. It was further held that the Sherman Anti-Trust Law does not give any right of action for damages sustained by the payment of excessive, unjust or unreasonable rates, such relief being provided for by the Interstate Commerce Act.

At page 359 Judge Ray said:

> "It seems to me very plain that the Congress of the United States, having full power in the premises, has established this Commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the transportation of interstate commerce are legal and what are illegal; that is what rates are proper and just and reasonable and what are improper, unjust, excessive, and consequently, when so declared, illegal. It also seems clear to me that all complaining shippers are relegated to this Commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness and reasonableness of the rates established, filed, published and posted."

At page 361 the court said:

> "It follows that this demurrer must be sustained, unless it is unnecessary to allege in the complaint that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.
>
> The Sherman Act of July 2, 1890, 'An act to protect trade and commerce against unlawful restraints and monopolies,' gives to the injured party a right of action in any circuit court of the United States to any person or firm 'who shall be injured

in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful.' By such act, 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is hereby declared to be illegal.' So 'every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor,' etc. This act does not declare or purport to declare excessive or unreasonable or unjust rates for the transportation of interstate commerce illegal. If, however, there is a combination, contract, or conspiracy to raise rates, and charge and exact excessive and unreasonable or unjust or unjustly discriminatory, etc., rates, rates for the purpose of restraining trade or commerce (see Sections 1 and 3 of the Act), or such combination has that effect, then undoubtedly the combination or contract is illegal. But are the rates charged and paid illegal for the reason the combination is illegal? This act must be read and construed in connection with the Act to Regulate Commerce as amended to date. It is the latter act that deals specifically with rates, charges for the transportation of coal, etc., among the several states, from the one state to another, and, as seen, confers on this administrative commission power to ascertain and determine what rates are unjust, unreasonable, or excessive and consequently illegal. When it has acted on complaint made and declared a rate established by a common carrier engaged in interstate commerce unjust, excessive, or unreasonable, it is determined by and in the appropriate tribunal having jurisdiction and plenary power that such rate is illegal. When this is done, there is a proper basis for the recovery of damages in the District or Circuit Court of the United States under the provisions of Section 9 of the Commerce Act, based on the compulsory payment of excessive and unlawful rates. This is the true construction and meaning of the act as declared by the Supreme Court of the United States in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.* 204 U. S. 437, 438, 27 Sup. Ct. 356, 51

L. Ed. 553, where the court, after reciting the powers of the Commission, the duties and obligations of carriers as to rates, and the control of the Commission over them, says:

'Nor is there merit in the contention that Section 9 of the Act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. * * * In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.' * * *

"If it be true, and I hold it is, that a resort to the Interstate Commerce Commission is a condition precedent to the maintenance of an action in the Circuit Court of the United States to recover damages solely occasioned by the payment of excessive, unjust, or unreasonable rates for the transportation of interstate commerce, even when the exaction of such excessive rates was the result of a combination or conspiracy made unlawful by the Sherman Anti-Trust Law, then the complaint in such an action to recover such damages solely, must aver that the rates charged and exacted have been declared excessive or unreasonable or unjust by the Interstate Commerce Commission. Until that is done, the rates established, filed, published and posted must be re-

> garded as legal rates or lawful rates. * * * I do not think the Sherman Anti-Trust Law, so called, gives any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates. I do not think that this complaint states any cause of action whatever under the provision of that act. The cause of action for such damages as are alleged here is given by the Act to Regulate Commerce."

Plaintiff then amended the declaration, and on demurrer to the amended declaration the court held that it stated substantially the same cause of action and the demurrer was sustained. (*Meeker* v. *Lehigh Valley R. R. Co.* 175 Fed. 320.) On appeal from this decision the Circuit Court of Appeals, Second Circuit, held that the amended declaration, wherein it was stated for the first time that the railroad company and various mining companies had conspired *to increase the price of coal at the mines, and to obtain exclusive control of the coal business,* stated a cause of action under the anti-trust statute. The defendants made the point that the only damages which plaintiff claimed were those arising from unreasonable freight charges, and that the Interstate Commerce Commission was the tribunal to which resort must be had to determine the reasonableness of such charges. The court conceded the exclusive jurisdiction of the Commission, but pointed out that the plaintiff was not seeking redress as a shipper in the amended declaration; that he had not alleged defendant carried any coal for him, or that he had offered any for shipment; that defendant was not sued as a carrier, *but as a party to an unlawful conspiracy to monopolize the anthracite coal output;* that unreasonableness of the railroad rates was only one of the means employed to make the conspiracy effective, and that the increase of the price of coal at the mines was as essential to that result as the increase in

the transportation charge. (*Meeker* v. *Lehigh Valley R. R. Co.* 183 Fed. 548, decided Dec. 2, 1910.)

Meeker complained to the Interstate Commerce Commission against the same defendants making the same allegations as were made in the amended declaration in the federal court. It was claimed that the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company and others had obtained control of a large proportion of the anthracite coal output, had compelled independent dealers to enter into contracts, and that the railroad company not only had charged complainants unreasonable freight rates, but had granted rebates to the Lehigh Valley Coal Company and other competitors of complainant, and praying damages under the Commerce Act. June 8, 1911, the Commission found for the complainants (21 I. C. C. 129) and ordered the case held open for further consideration of the amount of damages which should be awarded. May 7, 1912, the Commission filed a supplemental report (23 I. C. C. 480) awarding complainants $96,000 and interest.

The railroad refused to comply with the order of the Commission for payment of this sum, within the time required by the statute, and pursuant to Section 16 of the Commerce Act, Meeker filed suit in the United States District Court praying judgment against the railroad company for the amount awarded by the Commission, and attorneys' fees. The trial resulted in a verdict for plaintiff and judgment for $109,000. Defendant appealed and the Circuit Court of Appeals, Third Circuit, reversed the judgment, on the ground that the Commission had exceeded its statutory powers in the assessment of damages. (211 Fed. 785.) The United States Supreme Court granted a writ of certiorari (234 U. S. 749), and on consideration of the case, reversed the Cir-

cuit Court of Appeals and affirmed the judgment of the District Court based on the award of the Commission. (236 U. S. 412.)

The series of Meeker cases indicates clearly the remedies provided by the Commerce Act for recovery of damages resulting from unreasonable freight charges, even when alleged to be the result of a conspiracy.

V.

There Is No Way of Determining What Rates, Other Than Those Published in the Tariffs, Should Have Been Paid by Plaintiff, That Question Being Purely Speculative.

Neither the declaration nor plaintiff's brief discloses how the jury is to determine what other rates than those published in the carrier's tariffs are to be used in arriving at the alleged damage to plaintiff. Plaintiff contends the jury should be permitted to fix the charges which should have been paid by plaintiff by speculating as to what rates might have been. It is obvious that legal damages cannot be computed by such speculation.

In *Central Coal & Coke Co.* v. *Hartman, supra,* it was held that only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable, and that estimates, speculations or conjectures of witnesses, unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty, will no more sustain a judgment than the conjectures of a jury.

In *American Sea Green Slate Co.* v. *O'Halloran, supra,* the Court of Appeals, Second Circuit, reversed a judgment under Section 7 of the Sherman Law, on the ground that the damages had been based on mere conjecture.

The case of *International Harvester Co.* v. *Ky.*, 234 U. S. 216, is illustrative of this point. The Harvester Company was convicted of having entered into a conspiracy with others for the purpose of controlling the price of machinery, fixing prices and selling harvesters at a price in excess of their real value. The standard established by the Kentucky courts as to what was the "real value" was declared to be the "market value" under fair competition and under normal market conditions. Mr. Justice Holmes referred to this standard as guessing at what prices would have been if the combination had not existed and nothing else violently affecting values had occurred, and said that it was impossible to think away the principal facts of the case as it existed and say what would have been the price in an imaginary world. At page 22 the court said:

> "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with the inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind."

Not only would the jury be permitted to speculate as to what competitive rates the carriers might have established but also speculate as to whether or not the Interstate Commerce Commission would have permitted such rates to have been enforced. Not only is it the duty of

the Commission to see that rates are not unreasonably high, but also to prevent the establishment of rates which are so low as to be discriminatory. In this case the Commission found that some of the rates now complained of by plaintiff in this suit were so low that until restored to their original level they had discriminated against plaintiff's competitors in Dubuque.

In an effort to find contemporaneous spheres of activity for both the Interstate Commerce Commission and juries in the fixing of freight rates which shippers must pay, plaintiff relies upon the case of *Skinner and Eddy Corporation* v. *United States*, 249 U. S. 557, quoting in italics on page 30 of his brief the following:

> "railroads still have power to fix rates as low as they choose and to reduce rates when they choose."

Not only is the *Skinner & Eddy case* entirely foreign to the issues here, but it should not require much comment to point out that the carriers can in no event make rates which create the unjust discriminations prohibited by Section 3 of the Interstate Commerce Act. Unfortunately counsel fail to quote that portion of the decision in the *Skinner & Eddy case* which immediately follows and which shows clearly that carriers cannot under the law make rates so low as to produce unjust discrimination. At page 566 the court says:

> "But the main source of the Commission's influence to prevent excessively low rates lies in its power to prevent unjust discrimination. Compare *Houston E. & W. T. T. Co.* v. *United States*, 234 U. S. 342. The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained the rate applicable to the locality or article discriminated against must be reduced."

It has always been held by both the Commission and

the courts that charges may be reasonable and yet unlawful because of their unduly discriminatory character.

Board of Trade of Lynchburg v. *Old Dominion S. S. Co.* 6 I. C. C. 632.

Lumber Men's Exchange of St. Louis v. *A. S. R. R. Co.* 24 I. C. C. 220.

Transcontinental Commodity Rates, 32 I. C. C. 449.

Through Rates to Points in Louisiana and Texas, 38 I. C. C. 153, at 162.

In *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 145 U. S. 263, at 277, this court said:

> "We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under Section 1, and yet create an unjust discrimination and unreasonable preference under Sections 2 and 3."

This was cited with approval in *American Express Company* v. *South Dakota,* 244 U. S. 617, at page 624.

In the *Abilene case,* 204 U. S. 426, at 439, the duality of standards set up by the Interstate Commerce Act was again recognized. The court says:

> "When the act to regulate commerce was enacted there was a contrariety of opinion whether, when a rate charged by a carrier was, in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damages asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. That the act to regulate commerce was intended to afford an effective means for redressing the wrong resulting from unjust discrimination and undue preference is undoubted. Indeed it is not open to controversy that to provide for these subjects was among the principal purposes of the act."

Thus for the plaintiff now to contend that under the

law the carriers could have made rates as low as they chose without interference by the Interstate Commerce Commission is to disregard all of the decisions which have gone before.

As a matter of fact the Interstate Commerce Commission has long asserted the right to suspend proposed rates in order to prevent apparent discrimination. In *Suspension of Rates on Packing-House Products,* 21 I. C. C. 68, at page 70, the Commission said:

> "Upon these contentions the Commission now decides that it has the power to suspend reductions of rates in any case where such suspension will operate to prevent an apparent discrimination."

In *Board of Trade of Chicago* v. *Illinois Central R. R. Co.,* 26 I. C. C. 545, at page 552, the Commission said:

> "The Commission has power to suspend reductions in rates where the effect of such suspension will prevent an obvious or apparent unjust discrimination, and a *prima facie* case clearly and affirmatively persuasive is presented to justify the exercise of that power."

Citing the first of these decisions the Commission has recently suspended proposed reductions in rates and ordered them canceled.

Coal from Detroit, Toledo and Ironton Mines, 64 I. C. C. 564.

Reduced Rates on Coal to Kansas City Mo. 66 I. C. C. 457.

Sublimed Lead to Trunk Line Points (Unreported Opinion) decided April 5, 1922.

Under the law it was not within the whim or caprice of a carrier to make a rate for competitive reasons as low as it chose without being responsible to anyone. Instead the mandate of Section three of the Interstate Commerce Act was always applicable—that carriers

must not make rates which would result in unjust discrimination.

That the rate Mr. Keogh would have the jury use as the measure of his damages would have violated the provision of Section three if the carriers had maintained it is established by the series of cases which we have denominated as the four Keogh cases and the complaint of Dubuque shippers. Not only is it speculative what rate the traffic manager of a particular carrier might have made, but it is even more speculative whether the Interstate Commerce Commission would have permitted such rate to remain in effect.

Conclusion.

This suit is not the proper remedy for the redress of injuries arising from exaction of improper freight charges. If plaintiff had sustained such injuries, the remedy was provided by the Commerce Act. But plaintiff sustained no injury; the rates were not excessive or unreasonable, or unjustly discriminatory. The court did not have power in this case to re-examine that question, which had been conclusively settled by the judgments of the Interstate Commerce Commission. Rates valid under the Interstate Commerce Act could not be invalid under any other statute. There being no damage, there could be no action. The trial court did not err in overruling the demurrers and the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 823 [illegible]51

JOHN W. KEOGH,

Petitioner,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

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PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

I.

CERTIORARI IS NOT THE PROPER MODE OF REVIEW.

Petitioner brought suit in the District Court of the United States for the Northern District of Illinois, for $125,000 damages, under Section 7 of the Sherman Anti-Trust Act. Defendants filed pleas of the general issue and special pleas. Plaintiff demurred to the special pleas. The District Court overruled the demurrers and plaintiff elected to stand by same. Judgment was en-

tered in favor of defendants. Plaintiff took the case on error to the United States Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the judgment of the District Court.

The case does not fall within the provisions of Section 128 of the Judicial Code and Section 241 of the Judicial Code provides for review in this court on writ of error. Therefore certiorari is not applicable. (*U. S.* v. *Beatty*, 232 U. S. 463, 466.)

Section 240 of the Judicial Code provides for review by certiorari in any case in which the judgment or decree of the Circuit Court of Appeals is made final. (36 Stat. L. 1157.)

Section 128 of the Judicial Code provides that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction of the District Court is dependent entirely upon diversity of citizenship, and in all cases arising under the patent, trade-mark, copyright, revenue, or criminal laws, Federal Employers' Liability Act, Hours of Service Act, Safety Appliance Acts, and in bankruptcy and admiralty cases. (36 Stat. L. 1133, as amended by 38 Stat. L. 803 and 39 Stat. L. 727.)

This suit did not arise under any laws specified in Section 128 and the jurisdiction of the District Court was not dependent on diversity of citizenship. The judgment of the Circuit Court of Appeals is not made final by Section 128.

Section 241 of the Judicial Code provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the code, there shall be, of right, an

appeal or writ of error to the Supreme Court, where the matter in controversy shall exceed $1,000, besides costs. (36 Stat. L. 1157.)

This judgment is reviewable only by writ of error, under Section 241 of the Judicial Code, and the writ of certiorari is not applicable. (*U. S.* v. *Beatty, supra.*)

II.

EVEN IF CERTIORARI WERE THE PROPER MODE OF REVIEW, THE WRIT SHOULD NOT BE ALLOWED IN THIS CASE. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS WAS MANIFESTLY RIGHT.

Petitioner says (p. 30 petition):

> "The court did not pass upon the question as to whether or not the defendants were guilty of conspiracy under the antitrust law."

On the record, that question was not presented. The charge of conspiracy was denied by defendants' pleas of the general issue. The issue of fact made by those pleas was not tried in the District Court, as the case was disposed of on plaintiff's demurrers to defendants' special pleas.

The suit was for private pecuniary injury to plaintiff, under Section 7 of the Sherman Law. Pecuniary loss to plaintiff, as distinguished from injuries suffered by him in common with the general public, was the basis of the cause of action. Plaintiff's declaration alleged that such pecuniary injury resulted to plaintiff from the payment and collection of "uniform, arbitrary, noncompetitive and unreasonable freight rates." The special pleas in substance averred that plaintiff had had a long series of disputes with the carriers over interstate rates on excel-

sior and flax tow; that the matter had been repeatedly submitted to the Interstate Commerce Commission in proceedings instituted by plaintiff before that body*; that the Commission had thoroughly investigated all the rates alleged by plaintiff in this lawsuit to be "uniform, arbitrary, noncompetitive and unreasonable" and had found all of said rates reasonable; that all rates paid by plaintiff, the payment of which was alleged in this suit to have been the cause of the supposed damages, were the same rates specifically approved and ordered enforced by the Interstate Commerce Commission.

The theory of the special pleas was that the Interstate Commerce Commission has exclusive jurisdiction to determine when interstate freight rates are unreasonable and that its findings and orders in the Keogh rate cases were conclusive; that the statutory obligations to pay and collect the rates approved by the Interstate Commerce Commission and duly published and filed as required by the law, could not be avoided under the pretense that the collection of such rates, lawful under the Interstate Commerce Act, constituted a wrongful act, giving a cause of action for damages under any other statute; that in order to allow plaintiff damages it would be necessary not only for the court and jury to find that the rates approved by the Interstate Commerce Commission were unreasonable, but also necessary for the court and jury to fix, by pure speculation, what interstate rates *might have been;* that the result of a recovery by plaintiff would be a rebate from the tariff rates, which the law required him to pay and required the carriers to collect, and which had been paid by all other shippers; that if plaintiff had sustained any injury from

John W. Keogh v. *C. B. & Q. R. R. Co.* 24 I. C. C. 606; *John W. Keogh* v. *M. St. P. & S. S. M. Ry. Co.* 26 I. C. C. 73; Rates on Excelsior and Flax Tow from St. Paul, Minnesota, 29 I. C. C. 640; The Excelsior and Flax Tow Cases, 36 I. C. C. 349.

the exaction of unreasonable freight charges, the Interstate Commerce Commission had exclusive power to relieve the plaintiff from the controlling effect of the tariffs and to award him reparation for all damages sustained because of the payment of such rates.

The District Court held that the special pleas set up a good defense and its judgment has been affirmed by the Circuit Court of Appeals. Opinion of the Court of Appeals is appended hereto. Obviously this case is controlled by *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* 204 U. S. 426, and the long line of decisions of this Court following the Abilene case, by which it has been settled that the question of the reasonableness of interstate freight rates is committed to the exclusive jurisdiction of the Interstate Commerce Commission and cannot be relitigated in the courts.

Throughout this lawsuit plaintiff has placed great reliance on *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. Those cases were suits for dissolution *by the Government,* under Section 4 of the Sherman Law. The rates were not in question and had not been passed upon by the Interstate Commerce Commission, even under its then limited authority over rates. This suit is by an *individual,* for specific pecuniary loss; the charge of conspiracy was not tried, but the case turned solely upon plaintiff's claim of pecuniary damage *from the rates.* All the rates in question had been specifically approved and ordered enforced by the Interstate Commerce Commission. It may be, as plaintiff thought, that the Commission was mistaken each time as to the reasonableness of these rates, but nevertheless Congress has committed that question to the exclusive jurisdiction of the Commission and its

judgments cannot be reviewed in a lawsuit of this character.

Respectfully submitted,

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Of Counsel.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2776. OCTOBER TERM AND SESSION, 1920.

John W. Keogh,
Plaintiff in Error,
vs.
Chicago & North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, *et al.*,
Defendants in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before BAKER and ALSCHULER, *Circuit Judges,* and FITZHENRY, *District Judge.*

This writ of error was sued out by plaintiff to reverse the judgment in favor of the defendant in the District Court. He brought his action to recover three-fold damages under the provisions of the Sherman Anti-Trust Act. The declaration alleges in substance that on September 1st, 1912, and for several years prior, plaintiff was engaged in the business of manufacturing and selling excelsior and tow, with his principal office and place of business in Chicago; from 1909 to the date of the commencement of this suit he owned and operated a mill at St. Paul, Minnesota, where he manufactured his products and shipped them to various consignees in interstate trade and commerce within the meaning of the Act of Congress of July 2nd, 1890, entitled, "An Act to Pro-

tect Trade and Commerce Against Unlawful Restraints and Monopolies." The defendant corporations, during the same time, were common carriers, engaged in interstate commerce from St. Paul to various points. The individual defendants are the officers, agents and employees of the defendant corporations. It is charged that after September 1, 1912, plaintiff paid large sums of money to the various carriers for transporting his products from St. Paul; that the defendant corporations, at their expense, maintained an association known as "The Western Trunk Line Committee"; that the members of the association were competing carriers in interstate commerce and the object of the association is to agree upon, fix, maintain and publish uniform, arbitrary and noncompetitive freight rates to competing points; that one of the rules of the association requires the unanimous vote of all members to fix or change a freight rate and all members must abide by the decision of the association and maintain the freight rates so fixed. Any member failing to maintain the rates, so fixed, shall be expelled or suffer other penalties; that the committee met from time to time in Chicago and agreed upon, fixed, maintained and published freight rates to various points in several states, and the rates so fixed were arbitrary, uniform, unreasonable, and non-competitive and not based on what would be a fair remunerative rate to the carriers transporting such freight; and that it maintained and published such rates in violation of the Anti-Trust Act of Congress; that thereby all competition for the transportation of excelsior and tow from St. Paul was destroyed and the rates agreed upon maintained; that defendants during the period unlawfully conspired to and did restrain trade and commerce among several states, contrary to the statute; and by reason of the conspiracy plaintiff had been injured in his business and property,

in that the freight rates which defendants collected for the transportation of excelsior and tow from the plaintiff were greatly increased over the freight rates which would have been charged and collected if no such conspiracy had been entered into, setting forth a detailed statement of shipments made by the plaintiff from St. Paul to various points between September 1, 1912, and the date of the commencement of this suit; that the defendant corporations embraced all the common carriers running out of St. Paul, and it was necessary for him to patronize all or some of the defendants; that the consequence of the conspiracy was that plaintiff's profits during the time in question were reduced to the extent of the difference between the rate that would have existed had it not been for the conspiracy and the rates collected as a result thereof.

The second count charges that from September 1, 1912, the defendants carried on their business in accordance with the plans adopted by The Western Trunk Line Committee and all competition as to rates for the transportation of excelsior and tow from St. Paul which had theretofore existed was prevented and destroyed by the fixing of the rates which were greatly in excess of the freight rates which but for the conspiracy would have prevailed. That in 1909 and 1910 plaintiff built a tow and excelsior mill at St. Paul at great expense and prior to September 1, 1912, he had shipped 9,000 tons of his products per year, and that his net profit on Chicago shipments was $1 per ton; that after that date, defendants increased freight rates on his products from St. Paul to Chicago and other points; that the rates were not competitive and were the result of the combination and conspiracy, and all competition on the freight rates was destroyed. By reason of the alleged unlawful rates and in consequence of the conspiracy, the net profits of

the plaintiff on excelsior and tow manufactured by him, decreased from $1 per ton to 30c per ton; that the contract and combination was in restraint of trade and commerce, contrary to the provisions of the statute.

Defendants filed separate pleas of the general issue and notices of special matters to be shown in defense. The special matters set up in the notices were in substance that the rates complained of in the declaration were those that were subject to the jurisdiction of the Interstate Commerce Commission; that in the months of September, October, November and December, 1912, the defendants filed schedules or tariffs with the Interstate Commerce Commission, which were published as required by law, and carried the rates on excelsior and tow mentioned in the declaration; that the plaintiff had filed his complaint with the Interstate Commerce Commission, which, upon a hearing, held that the rates from St. Paul to Chicago were reasonable and that the rates from St. Paul to interstate destinations other than Chicago were lawful in so far as they did not represent advances over previous interstate rates of more than 3½c per 100 pounds. Plaintiff filed his application for a rehearing, which was denied; later, he filed a second petition to have the case reopened, for the purpose of considering whether carload rates on a 30,000 lb. minimum basis on plaintiff's products should be made lower than rates fixed by the Commission upon a 20,000 lb. minimum basis. Upon a hearing, the rates as fixed upon the prior hearing, were permitted to stand by the Commission. Afterwards, defendants filed amended and modified schedules, applying to these products, from St. Paul to St. Louis, Missouri, Des Moines, Iowa, and other destinations, which were in accordance with the findings and report of the Commission. All the tariffs and schedules

of which the plaintiff complains have been found by the Commission to be reasonable and lawful.

In the progress of the trial in the court below, the Court intimated that in its judgment the special matters referred to in the notices, if proved, would be a bar to the action. By agreement, the jury was discharged, the special matters set forth in the amended notices were considered as having been well pleaded in one or more special pleas to the declaration, and the reports and orders of the Interstate Commerce Commission in the tow and excelsior cases should be considered as having been set forth and incorporated in the special pleas; that a general demurrer to each of said special pleas be interposed on the ground that the facts alleged in the said special pleas do not constitute a defense at law. The Court thereupon overruled the demurrers. Plaintiff elected to stand by his demurrers, the suit was dismissed and judgment rendered against the plaintiff for costs.

FitzHenry, *District Judge,* delivered the opinion of the Court.

Plaintiff in error seeks to set aside the judgment of the District Court against him in his action for damages against the defendants under Section 7 of the Sherman Anti-Trust Act, upon the ground that the trial court erred in holding the fact that the freight rates charged and collected by the defendants had been found to be reasonable by the Interstate Commerce Commission was a defense to the action, and overruled plaintiff's demurrers to the defendants' pleas setting out the proceedings had before the Commission.

If the plaintiff had a remedy in the premises it was by virtue of Sec. 7, *supra,* which provides:

> "Any person *who shall be injured in his business or property* by any other person or corporation by

> reason of anything forbidden or declared by this act may sue therefor * * * and shall recover three-fold the damages *by him sustained* * * *." (Italics ours.)

Under this statute those who may sue for three-fold damages by virtue of its terms are limited to those "who shall be injured in his business or property," and if a recovery is permitted it must be limited to the damages "by him sustained." *Pennsylvania Ry. Co.* v. *International Coal Co.* 230 U. S. 184. The mere fact that the defendants might have been subject to a criminal prosecution by the Government, or to corrective or coersive proceedings at the instance of the Interstate Commerce Commission is of no avail to a litigant unless it is established that he sustained pecuniary damage. *Pennsylvania Ry. Co.* v. *International Coal Co. supra; Knudsen* v. *Michigan Central R. R. Co.* 148 Fed. 968; *Meeker* v. *Lehigh Valley R. R.* 183 Fed. 548; *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96; *Motion Picture Patents Co.* v. *E. Clair Film Co.* 208 Fed. 426; *Imperial Film Co.* v. *General Film Co.* 244 Fed. 985.

To recover under this statute plaintiff must show, as a result of the defendants' acts, actual damages were sustained. These damages must be proved by facts from which their existence is logically and legally inferable, not by conjecture nor estimates. *American Seagreen Slate Co.* v. *O'Halloran,* 229 Fed. 77; *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96.

Plaintiff in the first count of his declaration very clearly limits his damages due to the alleged conspiracy or combination in restraint of trade to the difference between the rates that were charged by reason thereof and what the rates might have been had the alleged conspiracy not intervened, but described in the second count as having had the effect of reducing plaintiff's profits on his

products from $1 to 30c per ton. No other element of damage is suggested by the pleadings. The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission.

A similar question was before this Court in *National Pole Co.* v. *Chicago & North Western Ry. Co.* 211 Fed. 65. In that case, upon the authority of *Texas Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* 204 U. S. 426, we held that the question of the reasonableness of a freight tariff was one which was addressed originally and exclusively under the Act to Regulate Commerce to the Interstate Commerce Commission; that this must necessarily be true from the nature of the enterprise involved. The fixing of a just rate for a common carrier for the transportation of persons and property in interstate commerce involves the exercise of a legislative discretion. In the *National Pole Co.* case, *supra,* this Court said:

> "Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the Commission and have named the rate therefor in a statute. But, with the increasing complexities of human activities, it was impossible to cover the details of rate-making (and the same is true of many other subjects) by specific statutes; and so the board or commission form of legislation is used. That is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. * * * But since the congressional prohibition of unjust rates cannot, by the terms of the act, be effective against a particular published rate, although unjust, until the Commission has investigated the service in question and has established the standard of just-

> ness for all shippers who use that service, the action of the Commission in the regulation of rates is quasi legislative—it converts the actual legislation from a static into a dynamic condition."

And this view has found lodgment in numerous expressions of the Supreme Court upon this same proposition many times since.

When plaintiff first felt aggrieved he sought his relief by the proper procedure—by filing his complaint with the Interstate Commerce Commission. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557; and cases cited. And the finding of the Commission upon this subject was conclusive. *Skinner & Eddy Corporation* v. *United States, supra.*

Had the schedules filed in 1912 been found by the Commission to carry unreasonable and oppressive rates in violation of law, and the amount of damages sustained by reason of defendants charging and collecting the rates provided in the schedules, a different case would be presented. In such case a judicial question would be involved which might be adjudicated in a court as well as before the Commission; but inasmuch as the Commission took the contrary view, holding that the rates provided in the schedules and charged by the defendants and collected from the plaintiff for the shipments complained of were reasonable, a different situation arises.

Congress in the passage of the Act to Regulate Commerce having provided the rules of law applicable to freight charges, and, the administrative board,—Interstate Commerce Commission—having determined the rates fixed by the schedules complained of were within the statute, the plaintiff has no other alternative than to regard the rates as reasonable and as having been well established. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* 215 U. S. 452; *Proctor & Gam-*

ble v. *United States,* 225 U. S. 282; *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423; *Interstate Commerce Commission* v. *Atchison, Topeka & Santa Fe R. R. Co.* 234 U. S. 294.

The rates in defendants' tariff schedules complained of in plaintiff's declaration having been found, by the Interstate Commerce Commission, to be reasonable, are to be treated as though they were embodied in a statute, binding as such upon both defendants and plaintiff alike. *Pennsylvania Ry. Co.* v. *International Coal Co.* 230 U. S. 184-196.

The only element of damage alleged in plaintiff's declaration being predicated upon the payment of freight rates which the plaintiff was required by law to pay and the defendants were required by law to collect, it is apparent that the special matters set out in the several pleas did present a complete defense to the action. It was therefore unnecessary to adjudicate the question as to whether or not the defendants were guilty of the crime of conspiracy under the Anti-Trust Law. If no provable damages were sustained by the plaintiff, there can be no recovery. The demurrers were properly overruled and the judgment of the District Court will accordingly be.

AFFIRMED.

NO. [redacted]51

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

JOHN W. KEOGH,
Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1921.

JOHN W. KEOGH,
Plaintiff in Error,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The declaration shows that plaintiff suffered pecuniary damages, recoverable under Section 7 of the Anti-Trust Act.

Counsel for defendants in error do not question that the acts set forth in the declaration constitute a violation of Section 1 of the Anti-Trust Act, but seek to sustain the judgment of the lower courts on the ground that plaintiff in error suffered no pecuniary damage. The declaration alleges that as the direct result of the unlawful acts of the defendants, plaintiff was injured in his business and suffered damages and specifies particularly the nature of the damages.

Several cases are cited by defendants in error to the effect that the damages must be proved and not guessed at. The question of proof is not involved in this case. As said by the Court of Appeals in *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251:

> "It may be that the plaintiffs will be unable to establish the essential elements of the claim for damages which they set up. But they are entitled to their opportunity—to their full day in court."

In that case the suit was dismissed before all the plaintiff's evidence was in. The declaration in that case contained only a general allegation of damages. The case is reported in this Court as *Thomsen* v. *Cayser*, 243 U. S., 73, wherein the judgment of the District Court in favor of the plaintiff was upheld.

In *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. 548, the Circuit Court of Appeals of the Second Circuit held that on demurrer a general allegation of damages was sufficient.

II.

The Interstate Commerce Act has no application to this case.

As in the Court below, counsel for defendants in error give more attention in their brief to the Interstate Commerce Act than they do to the Anti-Trust Act. They seek to confuse this action with one arising under Sections 8 or 9 of the Commerce Act. It is contended that the Commerce Act regulates rates, and therefore reference must be made to it to determine what rates are unlawful. It is argued that to permit a recovery against common carriers for such unlawful acts as set forth in the declaration would destroy the Commerce Act. There is no conflict whatever between the provisions of the Commerce Act and the Anti-Trust Act. It is said that wherever the Commerce Act applies it controls. The

same thing may be said of the Anti-Trust Act. This action is brought under the Anti-Trust Act and of necessity its provisions control. The action is not based on injury from payment of approved rates, as counsel state, but on the provisions of a statute which gives a right of action for damages to any person who suffers injury by reason of an unlawful combination or monoply. The cases cited by defendants in error relate to actions under the Commerce Act. That Act covers a different field than the Anti-Trust Act. Combinations in restraint of trade are not prohibited by the Commerce Act. Great reliance is placed by counsel for defendants in error on the *Abilene Oil case.* That was an action to recover money alleged to have been exacted from the plaintiff by the defendant in excess of a fair and reasonable rate. It involved the proper construction of the Commerce Act, and it was held that a shipper seeking reparation predicated upon the unreasonableness of an established rate must, under the Commerce Act, primarily invoke redress through the Interstate Commerce Commission. No question of conspiracy or combination of carriers in violation of the Anti-Trust Act was involved.

If the contention of defendants in error is sound, Section 7 of the Anti-Trust Act has no application to common carriers violating Sections 1 and 2 of the Act. Defendants in error, by indirection, seek such a ruling. It was urged in the *Trans-Missouri* and *Joint Traffic cases* that the Anti-Trust Act did not apply to common carriers. This Court held in those cases, and in others, that the Anti-Trust Act does apply to common carriers. In fact, this Court held, in *Thomsen* v. *Cayser,* 243 U. S. 66 that the Anti-Trust Act applied more strictly to common carriers than to others. At page 85 it is said:

> "The rule condemning the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases."

This suit is against several individuals, as well as the corporate defendants, and any one of the individual defendants is liable for the damages resulting from the unlawful conspiracy in which he participated. It surely would not be contended that the Commerce Act exempts the individual defendants from liability under Section 7 of the Anti-Trust Act for any acts in violation of Section 1 thereof. As the result of their unlawful acts plaintiff was charged higher rates than he would otherwise have had to pay and his business was injured. The individual defendants plead as a defense that the higher rates which plaintiff was compelled to pay were held, in a proceeding before the Commission to which they were not parties, not to be in excess of the "maximum rates to be charged," under the Commerce Act. In other words, when charged with the violation of one statute they plead that a Commission found their corporate co-defendants not guilty of violating another statute.

III.

The findings of the Interstate Commerce Commission are not competent or material in this case.

Under the third and fourth points of their brief, defendants in error contend that the Interstate Commerce Commission has exclusive jurisdiction over freight rates, and that it alone can make findings upon which shippers may recover damages, and that such findings cannot be reviewed in this proceeding. Plaintiff in error is not seeking to review the findings of the Commission. On the other hand, we contend that such findings are inadmissible and have not the slightest bearing in a suit such as this brought under the Anti-Trust Act. Such orders can have no greater effect than provided by statute.

Section 16 of the Commerce Act provides that such order shall be *prima facie* evidence of the facts therein

stated in any proceeding in court to enforce the order of the Commission. Counsel for defendants in error have not cited any cases holding that the finding or order of the Commission is admissible in a proceeding under the Anti-Trust Act. Both the subject-matter and the cause of action in the two proceedings are different and the parties are not the same.

The argument of defendants in error amounts to this, that if two or more competitive carriers combine in violation of Section 1 of the Anti-Trust Act and fix higher rates and then separately publish such rates and file the same with the Interstate Commerce Commission and such advanced rates are not so excessive as to be condemned by the Commission, they are not liable in damages for such violation of the Anti-Trust Act. It is manifest that, if defendants in error by this method can exempt themselves from liability to an individual under Section 7 of the Anti-Trust Act, they would have a good defense to a suit by the Government, either in equity or under the criminal code, by virtue of Sections 3 and 4 of the Act. This same argument has been made before and particularly in the *Joint Traffic case*. The contention though presented ably by eminent counsel, was held by this Court to be without merit.

If, as appears by the decisions of this Court in the *Joint Traffic* and other cases, common carriers who enter into such unlawful combinations may be enjoined in equity or proceeded against criminally, or their officers imprisoned, it would seem logical that they would be liable under Section 7 for the damages caused to individuals by reason of their unlawful acts. The whole argument of defendants in error runs counter to the reasoning of this Court in the *Trans-Missouri* and *Joint Traffic cases* and many subsequent cases cited in plaintiff in error's original brief.

If a suit cannot be maintained under Section 7 of the Anti-Trust Act until application has been made to the Interstate Commerce Commission and a finding had that the rates are unreasonable, common carriers violating Section 1 of the Anti-Trust Act would be exempt from the liability provided in Section 7. The injured party would merely have a claim for reparation under the Commerce Act. His suit would be based on the award of the Commission or to recover the excess over the rates fixed by the Commission, and manifestly the provisions of the Anti-Trust Act would have no bearing. He would be proceeding under the Commerce Act for a violation thereof, and not for a violation of the Anti-Trust Act.

Counsel might as well openly ask this Court to overrule its previous decisions, or at least add a proviso to Section 7 to the effect that it does not apply to common carriers. The language of Section 7 is too clear and explicit to admit of any such contention as that made by counsel for defendants in error.

The Commerce Act was designed, as counsel states, primarily to prevent discrimination. Counsel emphasize the necessity of uniformity in rates. Each carrier should and must treat all shippers alike, but the Anti-Trust Act then enters and provides for the further protection of the public by prohibiting agreements or combinations among competing carriers for the purpose of eliminating competition among such carriers. It is designed to give shippers the benefit of free and untrammeled competition and is in no way inconsistent with the Commerce Act, nor does it cover the same field. One Act secures equal treatment by a carrier of all shippers dealing with it, while the other secures to shippers and others the benefits that may result from competition among parallel or competing lines.

Under the heading, "Statement of the Case," counsel for defendants in error make an extended argument, based on the so-called *Keogh cases*. These cases arose under the Commerce Act. The Commission expressly refused to pass on any charge involving liability under the Anti-Trust Act, just as in this case the Court is asked to refuse to pass on the rights of the parties under the Commerce Act.

The Commission did not and could not lawfully determine whether the rates would have been lower, except for the unlawful combination of the defendants. There is nothing in the Commerce Act preventing an agreement such as entered into by the defendants in this case. It was said in the *Keogh case* that while the record justified an inference that the rates in question were increased as the result of a common understanding, yet the Commission could not determine that question, but must confine itself to the one question of whether the advanced rates were reasonable. (26 I. C. C. 692.)

The report of the Commission thus clearly illustrates the distinction between a suit under the Anti-Trust Act and a proceeding under the Commerce Act. No relief could be obtained under the Commerce Act unless the rates exceeded the maximum permitted by the Commission, even though the proof established conclusively that they were increased as the direct result of an agreement to fix arbitrary and non-competitive rates in violation of the Anti-Trust Act. The carriers might admit such an agreement and yet an injured party could get no relief from the Commission or by other proceeding under the Commerce Act, simply because that Act does not purport to apply to cases involving combinations to destroy competition. In such a case, however, the party injured would have an adequate remedy by a suit for damages under Section 7 of the Anti-Trust Act. It would not be

necessary in such proceeding to show that the rates were unreasonably high. If they were increased as the direct result of the unlawful combination and plaintiff was compelled to pay the advanced rates to his loss, or his business was in any way injured, that would be sufficient to entitle him to recover. In other words, the Court and jury would have to determine how much the rates were increased by reason of the unlawful combination, whereas, in a proceeding before the Interstate Commerce Commission, the sole question is the reasonableness of the advanced rates.

Among the cases cited by defendants in error is the *Meeker case*. The opinion of the district judge, whose views were held erroneous by the Court of Appeals, is quoted at great length on pages 26 to 29 of their brief. We presume the views of the district judge are quoted at such length because that is the only opinion in the reports which tends to support the contention of defendants in error. On page 37 of our original brief, we quote from the opinion of the Court of Appeals, which clearly points out the fallacy of the views of the District Court and of defendants in error. It it said, in explaining the decision of the Court of Appeals in the *Meeker case*, that the defendant was sued as a party to an unlawful conspiracy and not as a carrier. In the case at bar, plaintiff sued not as a shipper to obtain redress as to freight rates, but to recover damages suffered by him as a direct result of certain unlawful acts on the part of the defendants, some of whom are not common carriers. The language of the Court of Appeals in the *Meeker case* (183 Fed. 551) states exactly the position of plaintiff in error in this case. The other cases cited on this subject by defendants in error do not bear upon any of the questions involved.

IV.

The damages alleged are not speculative.

Under their fifth brief point, defendants in error contend that the damages alleged are speculative, and that there is no definite and certain standard by which a jury can determine the damages. The Court is not in position to pass on any question of damages, or the method of proof. The declaration alleges damages and the questions discussed by counsel cannot arise until evidence is offered on the subject of damages. The special pleas, and the demurrers thereto, do not present such questions. In all the cases cited by defendants in error there were trials on the issues, and the question of the sufficiency of the evidence properly presented. This Court cannot presume that plaintiff cannot prove the damages he alleges. The rules of law governing proof of damages are no different in this case than in any suit at law to recover damages.

It is said that the jury would have to speculate as to what the competitive rates would have been, and as to whether the Interstate Commerce Commission would have upheld such rates. Counsel have confused themselves by their efforts to inject the Commerce Act and the findings of the Commission into this case. The jury would not be concerned with the Interstate Commerce Commission, and it would be error to permit the Commission's views to be given to the jury. It admits of no doubt that in a suit under Section 7 of the Anti-Trust Act the plaintiff is entitled to a jury trial.

In *Thomsen* v. *Cayser*, 243 U. S. 66, this Court in passing upon similar contentions, said (p. 88):

> "The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that

more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 51 L. Ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury, and the verdict represented their conclusion."

In a suit under Sections 8 and 9 of the Commerce Act a jury must determine the amount of the damages and may disregard the award of the Interstate Commerce Commission.

Meeker v. *Lehigh Valley R. R. Co.*, 236 U. S. 412.

The damages can be as readily ascertained in this case as they could in *Chattanooga Foundry Co.* v. *Atlanta*, 203 U. S. 390, wherein the jury determined the difference between the price paid and the price that would have been paid if there had been no unlawful combination.

Many cases are cited by defendants in error, holding that a rate may be reasonable and yet create an unjust discrimination and preference. Such a proposition is obvious. Those decisions, however, do not support counsel's contention that the carriers cannot fix as low rates as they please. It is not true, as counsel state, that the Commission in the *Keogh case* found the rates too low. The Commission held that the carriers could not establish rates that were discriminatory. It said that the rates on excelsior and flax tow must be the same. The carriers had their election either to reduce the excelsior rates from 13½ cents to 10 cents, the flax tow rate, or to increase the tow rate to the excelsior rate. The Commission did not object because the rates were too low, but because the rates were discriminatory between different points or gave unjust preferences in violation of

the Commerce Act. It is not necessary to violate the Anti-Trust Act to avoid discriminatory rates. Regardless of the views of counsel for defendants in error, this Court, in *Skinner & Eddy Corporation* v. *U. S.*, 249 U. S. 557, relied upon by the Court of Appeals in its opinion, stated definitely that,

> "Railroads still have power to fix rates as low as they choose and to reduce rates when they choose."

This Court further said in that case, as quoted on page 33 of defendant in error's brief:

> "The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained the rate applicable to the locality or article discriminated against must be reduced."

The declaration alleges clearly that plaintiff suffered damages and the nature and extent thereof, and that such damages were the direct result of the unlawful acts of the defendants in error. These allegations cannot be overcome by the speculations and conjectures indulged in by the learned counsel for defendants in error as to possible difficulties to be encountered by plaintiff in error in his proof on the trial of the issues.

CONCLUSION.

Defendants in error practically admit the charges of violating Section 1 of the Anti-Trust Act. The language of Section 7 is clear and explicit that if plaintiff suffered any injury to his business or property by reason of such unlawful acts, he is entitled to recover treble the damages sustained. Defendants in error seek to escape liability by showing that their acts did not constitute a violation

of the Commerce Act. To sustain their position would nullify Section 7 of the Anti-Trust Act, so far as common carriers are concerned. This Court has frequently said that the public is entitled to the benefit of the lower rates that competition inevitably tends to bring about.

We respectfully submit that plaintiff in error, having alleged facts showing a violation of Section 1 of the Anti-Trust Act by the defendants in error, and having further alleged pecuniary loss resulting from such wrongful acts of defendants in error, is entitled to his full day in Court, which has so far been denied him.

We therefore repectfully submit that the judgments of the District Court and the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with directions to sutsain the demurrers to the special pleas of the defendants.

Respectfully submitted,

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KEOGH *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 51. Argued October 12, 1922.—Decided November 13, 1922.

1. Approval of rates as reasonable and non-discriminatory, by the Interstate Commerce Commission, fixes their character as such in relation to a shipper who took part in the proceedings. P. 161.
2. A combination of carriers to fix rates may be illegal and subject to proceedings by the Government, under the Anti-Trust Act, even though the rates are reasonable and non-discriminatory, and, it seems, even though they have been approved by the Interstate Commerce Commission. P. 161.
3. But a private shipper cannot recover damages from the carriers in such a case, under § 7 of the Anti-Trust Act, upon the ground that he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed, because:

(a) The fact that a rate results from a conspiracy in violation of the Anti-Trust Act does not render it necessarily illegal; and, as the legality of rates is determined by the Act to Regulate Commerce, and the shipper who suffers from illegal (unreasonable or discriminatory) rates has his remedy in damages under that act, it seems that Congress did not intend to provide him a further remedy for such illegal rates under § 7 of the Anti-Trust Act, and *a fortiori* none where the rates fixed by the conspiracy were found legal by the Commission. P. 162.

(b) The right of action given by § 7 of the Anti-Trust Act to one "injured in his business or property," implies violation of a legal right; but the legal right of a shipper respecting a carrier's rates is measured by the published tariff, and, to enforce a departure from this through a recovery under § 7, would be, in effect, to give the shipper an illegal preference. P. 163.

(c) Recovery would depend upon the plaintiff's proving that lower rates, which, but for the conspiracy, the carriers would have maintained, would have been non-discriminatory—a question which, generically, must first be submitted to the Interstate Commerce Commission, yet which, specifically, is not within its cognizance, because hypothetical. P. 163.

(d) The damages, if any, resulting to the shipper from the establishment of the higher rates could not be proved by facts from which their existence and amount were logically and legally inferable, but are purely speculative. P. 164.

271 Fed. 444, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, affirming a judgment of the District Court for defendant railroad companies and individuals, in an action brought by Keogh under § 7 of the Anti-Trust Act to recover damages alleged to have resulted from a combination to fix railroad rates, in restraint of interstate commerce.

Mr. H. P. Young, with whom *Mr. W. T. Alden*, *Mr. C. R. Latham* and *Mr. Charles Martin* were on the briefs, for plaintiff in error.

Sections 1 and 2 of the Anti-Trust Act prohibit all contracts and combinations which directly restrain trade or commerce.

Competition is the natural law of trade and the Anti-Trust Act was intended to prevent any contracts or combinations which destroy or stifle competition.

The mere fact that the rates fixed and maintained by the combination of the defendant companies were not excessive or unreasonable does not constitute a defense to an action under the Anti-Trust Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 65; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 339; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 83; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 340; *Thomsen* v. *Cayser*, 243 U. S. 66, 86; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433.

The right of a railroad company to charge reasonable rates does not include the right to enter into an agreement or combination to maintain reasonable rates.

It was the duty of the defendants to compete, and the Anti-Trust Act has a stricter application to them than to combinations of persons or corporations engaged in private pursuits. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 336; *Thomsen* v. *Cayser*, 243 U. S. 66, 85; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 86.

The natural effect of competition is to lower rates, and the direct and immediate effect of the agreement or combination described in the declaration was to increase the rates over the prevailing competitive rates.

The declaration alleges that plaintiff was compelled to pay more than a reasonable competitive rate, and that his business was injured and he suffered a loss of profits. These are proper elements of damage under the statute.

A general allegation of damages is sufficient, especially where no special demurrer or motion to make more specific is filed. The amount of such damages should have been submitted to the jury.

The findings of the Interstate Commerce Commission are not a bar to this suit, nor even admissible in evidence. The Commission has no power to decide questions arising under the Anti-Trust Act, and it has so held in the decisions relied upon in the special pleas of defendants.

The Commission is an administrative body and its findings have only the effect provided by statute. The act creating it does not give its findings any effect in other than proceedings under the Commerce Act. Even where the Commission makes a money award, its order is only *prima facie* evidence of the facts therein stated. *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412.

The finding of the Commission relates to a maximum rate which carriers must not exceed. It has no power to name the specific rate to be charged, nor can it determine the reasonable rates that would prevail under natural or competitive conditions.

Plaintiff is entitled under the Constitution to have a jury pass upon the issues and assess the damages.

Even in an action under the Commerce Act to recover damages for excessive freight charges, wherein the award of damages made by the Commission is admitted as *prima facie* evidence, the plaintiff is entitled to a jury trial.

The mere fact that the increased rates were filed with the Commission and published by the defendants separately, does not exempt them from liability under the Anti-Trust Act for their unlawful acts in agreeing jointly upon the rates. The Commerce Act cannot be made a refuge for violators of the Anti-Trust Act.

Mr. Bruce Scott, with whom *Mr. R. V. Fletcher, Mr. Kenneth F. Burgess* and *Mr. J. C. James* were on the brief, for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action, under § 7 of the Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209, was brought by Keogh in the federal District Court for Northern Illinois, Eastern Division, in November, 1914. Eight railroad companies and twelve individuals were made defendants. The case was heard upon demurrer to a special plea; the demurrer was overruled; judgment was entered for defendants, plaintiff electing to stand upon his demurrer; and this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. 271 Fed. 444. The case is here on writ of error.

The cause of action set forth was this: Keogh is a manufacturer of excelsior and flax tow at St. Paul, Minnesota. The defendant corporations are interstate carriers engaged in transporting freight from St. Paul to points in other States. Prior to September 1, 1912, these carriers formed an association known as the Western

Trunk Line Committee. The individual defendants are officers and agents of the carriers and represent them in that Committee. It is a function of the Committee to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers. By means of such agreement, competition as to interstate rates from St. Paul on excelsior and tow was eliminated; uniform rates were established; and interstate commerce was restrained. The uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates would have been if competition had not been thus eliminated. Through this agreement for uniform rates Keogh was damaged. The declaration contains a schedule of the amounts paid by him in excess of those which would have been paid under rates prevailing before September 1, 1912, and which, but for the conspiracy, would have remained in effect. He claims damages to the extent of this difference in rates. He also alleges as an item of damages that the increase in freight rates lessened the value of his St. Paul factory through loss of profits.

Defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation, upon complaint of Keogh, pursuant to the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended; that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that they were not made effective until after they had been so approved. The character of the proceedings before the Commission was more fully shown by reference to *Keogh* v. *Chicago, Burlington & Quincy R. R. Co.*, 24 I. C. C. 606; also *Rates on Excelsior and Flax Tow from St. Paul, Minn.*, 26 I. C. C. 689; *Rates*

on Excelsior and Flax Tow from St. Paul, Minn., 20 I. C. C. 640; *Morris, Johnson, Brown, Manufacturing Co.* v. *Illinois Central R. R. Co.*, 30 I. C. C. 443; *The Excelsior and Flax Tow Cases*, 36 I. C. C. 349.

The case is presented on these pleadings. Whether there is a cause of action under § 7 of the Anti-Trust Act is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the Act to Regulate Commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates; and that, as he has been damaged thereby, he is entitled to recover. The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one, or more, of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce struggle for business, established unremunerative rates. Since the case arose prior to the Transportation Act 1920, February 28, c. 91, § 418, 41 Stat. 456, 474, 485, the carriers were at liberty to establish or maintain, even unreasonably low rates provided they were not discriminatory. Compare *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 565.

All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction

under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot.

A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the "person injured thereby for the full amount of damages sustained in consequence of any such violation" together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.*, 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?

Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. R. Co.* v. *Mugg*, 202 U. S. 242; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *Dayton Iron Co.* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 239 U. S. 446; *Erie R. R. Co.* v. *Stone*, 244 U. S. 332. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U. S. 577. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440.

The character of the issues involved raises another obstacle to the maintenance of the action. The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that

the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action. To be legal a rate must be non-discriminatory. And the proceedings before the Commission in this controversy illustrate how readily claims of unjust discrimination arise. See *Morris, Johnson, Brown, Manufacturing Co.* v. *Illinois Central R. R. Co.*, 30 I. C. C. 443. For this reason, it is possible that no lower rate from St. Paul on tow and excelsior could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country. But it is the Commission which must determine whether a rate is discriminatory; at least, in the first instance. See *Abilene Case, supra; Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. It has been suggested that this requirement does not necessarily bar an action involving that issue; for a court might suspend its proceeding until the question of discrimination had been determined by the Commission. But here the difficulty presented could not be overcome by such a practice. The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would necessarily be confronted at a trial.

Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222–224); but the damages alleged are purely speculative. Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsyl-*

vania R. R. Co. v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.[1] To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Affirmed.

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[1] Compare *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96; *Motion Picture Patents Co.* v. *Eclair Film Co.*, 208 Fed. 416; *Locker* v. *American Tobacco Co.*, 218 Fed. 447; *American Sea Green Slate Co.* v. *O'Halloran*, 229 Fed. 77, 79; *Noyes* v. *Parsons*, 245 Fed. 689.